72-835

FILE COPY

FILED

DEC 7 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-835

JOHN M. PETTIBONE, DIRECTOR, DIVISION OF PAROLE AND PROBATION, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,

Petitioner,

v.

KENNETH WOODALL, #B-1-103228,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FRANCIS B. BURCH,
Attorney General of Maryland,
EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
JOHN P. STAFFORD, JR.,
Assistant Attorney General
of Maryland,
DAVID H. FELDMAN,
Assistant Attorney General
of Maryland,
One South Calvert Street,
Baltimore Maryland 21202,
(301) 383-3737,
Counsel for Petitioner.

RESPONSE NOT PRINTED

The Daily Record Co., Baltimore, Md. 21203

Table of Contents

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented:	
1. May the limited jurisdictional grant of 28 U.S.C. § 2254(a) allowing a federal court to entertain a state petitioner's habeas corpus application only on the ground that he is in custody in violation of federal law be expanded to permit cognizance of a petition raising only the discretionary question of the retroactivity of a decision invalidating the State legislature's long established juvenile age classification?	2
2. May a federal court disregard over the State's objection the exhaustion of state remedies requirements of 28 U.S.C. § 2254(b) & (c) by ruling on the substance of a habeas corpus petitioner's claim which had never been presented to the State's courts where the habeas petitioner purposely refused to pursue his claim in an adequate post conviction hearing offered by the State?	2
3. May retroactivity principles be applied to give unlimited retroactive effect to a decision holding State juvenile laws unconstitutional as creating an irrational age classification as of a recent date and thus cast into doubt 135,000 good faith criminal prosecutions where the record is silent on the classification's rationality when established by the State's legislature and when applied at a much earlier date?	3
4. May a federal court retroactively apply a decision and thereby impeach 135,000 State prosecutions based on a statutory classifica-	

tion in existence since 1941 where such retroactive application is contrary to controlling State and federal retroactivity authority? .....

5. May a federal court in granting habeas corpus relief expand the retroactive effect of a new federal rule by requiring expunction after verdict and judgment of a State's records relating to good faith criminal prosecutions undertaken in full compliance with then existing law? .....

STATUTORY PROVISIONS INVOLVED .....

STATEMENT OF THE CASE .....

REASONS FOR GRANTING THE WRIT .....

I. Conflicts With Decisions of This Court .....

II. Conflicts With Decisions of Other United States Courts .....

III. Conflicts With Maryland's Highest Courts .....

IV. The Need for This Court to Decide Important Questions of Federal Law .....

V. The Need for This Court to Exercise Its Power of Supervision .....

CONCLUSION .....

APPENDIX A:

Order filed September 21, 1972, by the United States Court of Appeals for the Fourth Circuit staying the mandates provided a writ of certiorari is filed within the time permitted by law

APPENDIX B:

Order filed September 8, 1971, by the United States Court of Appeals for the Fourth Circuit denying rehearing in banc .....

BLEED THROUGH POOR COPY

PAGE

APPENDIX C:

Opinion filed August 8, 1972, by the United States Court of Appeals for the Fourth Circuit in *Woodall v. Pettibone*, 465 F.2d 49 (4th Cir. 1972) 4a

APPENDIX D:

Memorandum and order filed January 31, 1972, by the United States District Court for the District of Maryland in *Woodall v. Keller*, 337 F. Supp. 595 (1967) 11a

APPENDIX E:

Opinion filed January 10, 1972, by the Court of Appeals of Maryland in *Franklin v. State*, 264 Md. 62, 285 A.2d 616 (1972) 22a

APPENDIX F:

Opinion filed January 29, 1971, by the Court of Special Appeals of Maryland in *Greene v. State*, 11 Md. App. 106, 273 A.2d 830 (1971) 29a

APPENDIX G:

Opinion filed January 18, 1971, by the United States Court of Appeals for the Fourth Circuit in *Long v. Robinson*, 436 F.2d 1116 (4th Cir. 1971) 36a

APPENDIX H:

Opinion filed August 6, 1970, by the United States District Court for the District of Maryland in *Long v. Robinson*, 316 F. Supp. 22 (D. Md. 1970) 43a

APPENDIX I:

Title 28, United States Code, § 2254 ..... 59a

APPENDIX J:

Annotated Code of Maryland, Volume 3, Art. 27, §§ 645A-J 62a

Table of Citations

Cases

	PAGE
Acuna v. Baker, 418 F.2d 639 (10th Cir. 1969)	16
Adams v. Illinois, 405 U.S. 278 (1972)	15
Brady v. Superintendent, 443 F.2d 1307 (4th Cir. 1971)	17
Brown v. Allen, 344 U.S. 391 (1963)	18
Evans v. Cunningham, 335 F.2d 491 (4th Cir. 1964)	18
Fay v. Noia, 372 U.S. 391 (1963)	22
Ferguson v. Cox, 464 F.2d 461 (4th Cir. 1972)	16
Franklin v. State, 264 Md. 62, 285 A.2d 616 (1972)	6, 14
Greene v. State, 11 Md. App. 106, 273 A.2d 830 (1971)	5, 14
Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932)	12
Hayes v. Boslow, 336 F.2d 31 (4th Cir. 1964), *cert. denied*, 386 U.S. 1039 (1967)	18
James v. Copinger, 441 F.2d 23 (4th Cir. 1971)	18
Jenkins v. Delaware, 395 U.S. 213 (1969)	17
Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972)	16
Linkletter v. Walker, 381 U.S. 618 (1965)	12
Long v. Robinson, 316 F. Supp. 22 (D. Md. 1970), *aff'd*, 436 F.2d 1116 (4th Cir. 1971)	4, 12
McNally v. Hill, 293 U.S. 131 (1934)	22
Peyton v. Rowe, 391 U.S. 54 (1968)	22
Picard v. Connor, 404 U.S. 270 (1971)	8, 13, 14
Reed v. Beto, 343 F.2d 723 (5th Cir. 1965)	19
Spencer v. Texas, 385 U.S. 554 (1967)	19
United States v. Wilkerson, 262 F. Supp. 596 (D.D.C. 1967)	16
United States ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970)	5
Vernon v. Warden, 11 Md. App. 340, 274 A.2d 405 (1971)	14

PAGE

Williams v. United States, 401 U.S. 646 (1971) 15
Woodall v. Keller, 337 F. Supp. 595 (D. Md. 1972) 8
Woodall v. Pettibone, 465 F.2d 49 (4th Cir. 1972) 10
Younger v. Harris, 401 U.S. 37 (1971) 13

Statutes and Rules

Baltimore City Charter & Public Local Laws:
Art. 4, § 240 (Flack ed. 1949) 4

Fed. R. Civ. P.:
Rule 23 4

Maryland Annotated Code:
Art. 5, § 12 (Supp. 1971) 4
Art. 26, § 51 (1966) 4
Art. 27, §§ 645A-J (1971) 3, 4, 6
Art. 42, § 1 (1971) 4

Maryland R.P.:
BK 42 14
BK 44a 14

28 U.S.C.:
§ 1254 2
§ 2243 21
§ 2254 ..... 2, 3, 6, 8, 9, 12, 13, 14, 18, 19, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. ------

JOHN M. PETTIBONE, DIRECTOR, DIVISION OF PAROLE AND PROBATION, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,

Petitioner,

v.

KENNETH WOODALL, #B-1-103228,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

John M. Pettibone, Director, Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services, Petitioner herein, by Francis B. Burch, Attorney General of Maryland, Edward F. Borgerding, Assistant Attorney General, Chief, Criminal Division, John P. Stafford, Jr., Assistant Attorney General, and David H. Feldman, Assistant Attorney General, his attorneys, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in these proceedings on August 8, 1972.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 465 F.2d 49 (4th Cir. 1972), and appears in Appendix C hereto at 4a. The memorandum and order of the United States District Court for the District of Maryland is reported at 337 F. Supp. 595 (D. Md. 1972), and appears in Appendix D hereto at 11a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 8, 1972. The order denying a timely petition for rehearing and suggestion for rehearing in banc was filed on September 8, 1972, and appears in Appendix B hereto at 3a. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May the limited jurisdictional grant of 28 U.S.C. §2254(a) allowing a federal court to entertain a state petitioner's habeas corpus application only on the ground that he is in custody in violation of federal law be expanded to permit cognizance of a petition raising only the discretionary question of the retroactivity of a decision invalidating the State legislature's long established juvenile age classification?

2. May a federal court disregard over the State's objection the exhaustion of state remedies requirements of 28 U.S.C. §2254(b) & (c) by ruling on the substance of a habeas corpus petitioner's claim which had never been presented to the State's courts where the habeas petitioner purposely refused to pursue his claim in an adequate post conviction hearing offered by the State?

BLEED THROUGH POOR COPY

3. May retroactivity principles be applied to give unlimited retroactive effect to a decision holding State juvenile laws unconstitutional as creating an irrational age classification as of a recent date and thus cast into doubt 135,000 good faith criminal prosecutions where the record is silent on the classification's rationality when established by the State legislature and when applied at a much earlier date?

4. May a federal court retroactively apply a decision and thereby impeach 135,000 State prosecutions based on a statutory classification in existence since 1941 where such retroactive application is contrary to controlling State and federal retroactivity authority?

5. May a federal court in granting habeas corpus relief expand the retroactive effect of a new federal rule by requiring expunction after verdict and judgment of a State's records relating to good faith criminal prosecutions undertaken in full compliance with then existing law?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254 at 7645-46, which appears in Appendix I hereto at 59a.

MD. ANN. CODE (vol. 3) art. 27, §§645A-J at 490 *et seq.*, which appears in Appendix J hereto at 62a.

STATEMENT OF THE CASE

Kenneth Woodall, Respondent herein, was convicted upon his plea of guilty in the Criminal Court of Baltimore on March 21, 1968, of the crime of robbery with a dangerous and deadly weapon. He was sentenced to a term of six years running from July 17, 1967. At no time since he entered his guilty plea has Respondent contested in Mary-

land's courts the disposition of his case, either by direct appeal,[1] post-conviction procedures,[2] or habeas corpus.[3]

Long v. Robinson, 316 F. Supp. 22 (D. Md. 1970),[4] *aff'd*, 436 F.2d 1116 (4th Cir. 1971),[5] holding unconstitutional as a denial of equal protection the Maryland Juvenile Causes Act, MD. ANN. CODE art. 26, §51, *et seq.* (1966), insofar as it exempted Baltimore City from the otherwise state-wide uniform juvenile age limit of eighteen years, and also holding unconstitutional as applied the provisions of BALTO. CITY CHARTER & PUB. LOC. LAWS art. 4, §240 (Flack ed. 1949), insofar as they defined a child as one under sixteen years of age, thereby excluding sixteen- and seventeen-year-olds, was decided by the United States District Court for the District of Maryland, per Watkins, C.J., on August 6, 1970. In *Long*, a class action by stipulation authorized by FED. R. CIV. P. 23(b)(2), Judge Watkins granted what he termed retroactive relief to all persons whose convictions had not become final as of the date the complaint had been filed, May 15, 1969. 316 F. Supp. at 31, App. H at 57a. Since the decision was not announced until August 6, 1970, it had practical operation upon all cases arising in the fifteen-month interval between the filing and decision dates, as well as upon those cases of an earlier date that were not finally decided on the filing date.

In its decision on appeal, filed January 18, 1971, the United States Court of Appeals for the Fourth Circuit affirmed

---

[1] MD. ANN. CODE art. 5, §12 (Supp. 1971), the pertinent part of which was applicable at the time Respondent entered his plea, guarantees a defendant a direct appeal in every case.

[2] Maryland's version of the Uniform Post Conviction Procedure Act, MD. ANN. CODE art. 27, §§645A-J (1971), has been continuously in effect since 1958, and is for the Court's convenience set out in Appendix J hereto at 62a.

[3] *See* MD. ANN. CODE art. 42, §1 *et. seq.* (1971).

[4] Printed in Appendix H hereto at 43a.

[5] Printed in Appendix G hereto at 36a.

BLEED THROUGH POOR COPY

e District Court's holding of unconstitutionality. 436 2d at 1118, App. G at 38a. However, in its opinion the ourth Circuit found the retroactivity question illusory, eferring instead to rest its ruling upon class action con-epts. 436 F.2d at 1118-20, App. G at 39a-42a. In so doing, ne Circuit Court by its decision effectively confirmed Judge Vatkins' fixing of the filing date, May 15, 1969, as the ef-ective date of the *Long* decision. Judge Boreman com-nented for the panel that a more expansive definition of class" "would, in effect, interfere with the court's power o decide that a declaratory judgment of unconstitutionality f a criminal law or procedure could be given prospective pplication only." 436 F.2d at 1119, App. G at 41a.

In *Greene v. State*, 11 Md. App. 106, 273 A.2d 830 (1971)[6] he Court of Special Appeals of Maryland was presented vith the same equal-protection question posed in *Long*. The briefs in *Greene* were filed before the District Court's lecision in *Long* and neither adverted to the pending fed-eral litigation. The Court of Special Appeals, obviously cognizant of the federal case, however, withheld its judg-nent until January 29, 1971, eleven days after the Fourth Circuit's decision in *Long*. Although free to reject the de-ision of the Fourth Circuit, *see United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970), the Court of Special Appeals was persuaded in *Greene* to concur with the decision in *Long* on the basis of the testimony developed in the Federal District Court. 11 Md. App. at 110, App. F at 32a. The appellant in *Greene* plainly fell within the class of persons which the Fourth Circuit had ruled entitled to relief in *Long*, and as the question of retroactivity had neither been briefed nor argued, nor in any other way been presented in *Greene*, the Court of Special Appeals in dictum addressing itself to the issue and accepting May

[6] Printed in Appendix F hereto at 29a.

15, 1969, as the effective date of the *Long* decision, merely respected the findings of the federal courts in *Long*.

When the Fourth Circuit handed down its decision in *Long*, Respondent Woodall was already twenty years of age. He had been incarcerated since July 1967 in adult correctional facilities. However, Respondent waited until September 1, 1971, almost the eve of his twenty-first birthday, to request any court action, state or federal, declaring that he should originally have been treated as a juvenile. On that date, Respondent, deliberately bypassing adequate State post-conviction remedies,[7] filed by counsel a petition for federal habeas corpus relief in the United States District Court for the District of Maryland. His single asserted ground for relief was that the decision in *Long v. Robinson, supra*, holding that the exemption of Baltimore City from the otherwise statewide juvenile age limit was unconstitutional, should apply retroactively to him. After the State's answer denying and traversing Respondent's allegation was timely filed, Respondent waited more than five weeks to file his memorandum of law in which he suggested at length that he should be excused from the exhaustion of state remedies requirements of 28 U.S.C. §2254(b) & (c) because of the decision by the Court of Special Appeals of Maryland in *Greene v. State, supra*.

While Respondent's federal habeas corpus petition was pending, the Court of Appeals of Maryland, the State's highest court, filed its opinion in *Franklin v. State*, 264 Md. 62, 285 A.2d 616 (1972).[8] In that case, briefed for Franklin by one of Respondent's counsel, the only question presented was the appropriate relief for a member of the class, as was Franklin, granted relief in *Long v.*

---

[7] *See* MD. ANN. CODE art. 27, §§645A-J (1971), which appears in Appendix J hereto at 62a.

[8] Printed in Appendix F hereto at 29a.

BLEED THROUGH POOR COPY

Robinson, supra. In *Greene*, the Court of Special Appeals, Maryland's intermediate appellate court, deciding the same question, had held that the appropriate relief was to remand the case to the Juvenile Court for a waiver hearing, after which (1) if that court determined not to waive jurisdiction it should proceed accordingly, and the Criminal Court should vacate its previous judgment; or (2) if the Juvenile Court determined to waive jurisdiction, the transcript should be returned to the Court of Special Appeals for consideration of the remaining issue in the case, the sufficiency of the evidence. 11 Md. App. at 113, App. F at 35a. However, Franklin's attorneys successfully persuaded the Court of Appeals of Maryland to reverse the holding in *Greene*. In *Franklin*, the Court of Appeals held that the appropriate relief for a member of the *Long* class was to first strike the criminal conviction and then remand the case to the Juvenile Court for a waiver hearing, after which (1) if that court determined not to waive its jurisdiction, it should proceed accordingly; or (2) if the Juvenile Court determined to waive jurisdiction, the accused should be tried anew in the Criminal Court. 264 Md. at 69, App. E at 28a. Gratuitously and without the retroactivity question's being either brief or argued or in any other way presented, the Court in *Franklin*, in dictum as had the *Greene* court, accepted the federal courts' determination of May 15, 1969, as the cut-off date for *Long's* effectiveness. 264 Md. at 68, App. E at 27a.

In a letter written by Respondent's counsel to the Federal District Court the next day, which letter was made a part of the official record on the subsequent appeals to the Fourth Circuit, as much and more was acknowledged:

> "Although, as I indicated to you in my December 30, 1971 letter, the issue of retroactivity now before you was not before the Court in *Franklin* and it was not

briefed or argued, the Court nevertheless chose to comment on the problem in the last line of page 5 and the first 8 lines of page 6 of its opinion. In that comment, the Court approves the language of the Court of Special Appeals in *Greene v. State* making *Long v. Robinson* retroactive only to May 15, 1969. As you will note, the discussion of this point consists of nothing more than a passing reference to two leading Supreme Court decisions and a conclusory sentence that May 15, 1969 was an appropriate date to select in defining the limit of retroactivity. In view of the fact that this statement is not only dictum but written without the benefit of adversary arguments and without any analysis or appreciation of the difficult legal questions involved, we respectfully suggest that the dictum should be given little weight in your consideration of the retroactivity issue posed in the case before you."

Nine days later, in response to this letter and in view of this Court's then one-month old decision in *Picard v. Connor*, 404 U.S. 270 (1971), the State, by a new Assistant Attorney General, filed a supplemental answer to the habeas corpus petition, alleging the obvious: *viz.*, that Respondent's contention had never been *presented* on its merits in Maryland's courts as required by *Picard* and accordingly should be dismissed as premature for Respondent's failure to exhaust his effective state judicial remedies as commanded by 28 U.S.C. §2254(b) & (c).

Nevertheless, in eleven days, on January 31, 1972, the United States District Court for the District of Maryland, per Murray, J., filed its memorandum and order, reported as *Woodall v. Keller*, 337 F. Supp. 595 (D. Md. 1972),[9] holding over Maryland's objections to the contrary that Respondent was foreclosed from raising his substantive claim in the State's courts and thus properly before the Federal

[9] Printed in Appendix D hereto at 11a.

POOR COPY

District Court, 337 F. Supp. at 596, App. D at 13a, but upon considering the retroactivity question on its merits, holding Respondent was not entitled to relief by retroactive application of the *Long* decision. 337 F. Supp. at 600-01, App. D at 20a-21a.

Respondent noted his appeal on February 25, 1972, after which the District Court filed an order denying a certificate of probable cause to appeal for the reasons set forth in its opinion, as well as for the additional reason that Respondent's retroactivity contention did *not* present a federal question as required by 28 U.S.C. §2254(a). Thereafter, counsel for the parties met with the Honorable Harrison L. Winter, United States Circuit Judge, at which time Respondent's counsel presented a motion for the issuance of the certificate of probable cause to appeal, which certificate was granted by order of Judge Winter on March 6, 1972.

Maryland noted her cross-appeal on March 7, 1972, from that portion of the District Court's memorandum and order rejecting her claim regarding Respondent's failure to exhaust his effective state judicial remedies. By order dated March 8, 1972, these cases were accelerated for oral argument to the May 1972 term of the Fourth Circuit, and the following day, upon the parties' joint motion to dispense with appendix and proceed on the original record, the Circuit Court ordered that the appeals be so submitted.

Subsequently, and after the filing of Respondent's principal Brief of 82 pages plus attachments, upon his motion by counsel because he had been released from incarceration and placed on parole, and with the concurrence of the original Appellee-Cross Appellant, it was ordered that John M. Pettibone, Director, Division of Parole and Probation, Maryland Department of Public Safety and Correctional

Services, Petitioner herein, be substituted as the Appellee-Cross Appellant of record in the appeals before the Fourth Circuit. Thereafter, Maryland filed her principal Brief of 62 pages and Respondent filed a Reply Brief of 35 pages.[10]

Extended oral argument of approximately one-hour per side was heard in Richmond, Virginia, on May 12, 1972, before the Honorable Herbert S. Boreman, Senior Circuit Judge, J. Braxton Craven, Jr., Circuit Judge, and Solomon Blatt, Jr., District Judge. At argument, the panel received over Maryland's written objection statistical data tendered by Respondent's counsel and also accepted eight affidavits then offered on behalf of the State. The Circuit Court also considered additional statistical data and letter memoranda submitted under dates of May 15, 17, and 26, and June 1, 9, 19, 20, and 29, 1972.[11]

The unanimous opinion of the above panel, reported as *Woodall v. Pettibone*, 465 F.2d 49 (4th Cir. 1972),[12] was filed by Judge Craven on August 8, 1972, in which opinion the Court rejected Maryland's claim that Respondent's petition should have been dismissed for failure to exhaust state judicial remedies. 465 F.2d at 50-51, App. C at 6a. Then, having bound Maryland for exhaustion purposes by her courts' dicta on *Long's* non-retroactivity in *Greene* and *Franklin*, the Fourth Circuit proceeded to ignore the State courts' dicta on this discretionary, policy question; and, similarly, without regard to the previous holdings of non-retroactivity by the District Court in *Long* and by the District Court below, held that *Long v. Robinson, supra*,

[10] All Briefs filed in the Fourth Circuit have been lodged with the Clerk of this Court together with the certified record.

[11] These items, the State's written objection to receipt of statistical data, and previous letter memoranda submitted by counsel for the parties are also lodged in the Clerk's office.

[12] Printed in Appendix C hereto at 4a.

BLEED THROUGH POOR COPY

is to be fully retroactively applied. 465 F.2d at 52, App. C at 8a-9a.

The State's petition for rehearing and suggestion for rehearing in banc was timely filed on August 21, 1972, and was denied by order of the Fourth Circuit filed on September 8, 1972.[13] This petition for a Writ of Ceritorari was filed within 90 days of the denial of rehearing in banc.

On September 13, 1972, Your Petitioner filed in the Fourth Circuit a motion for stay of mandates pending application for certiorari, which motion, after the filing of an opposition on behalf of Respondent, was granted by the Circuit Court on September 21, 1972, with the provision that this Petition be filed within the time permitted by law.[14]

REASONS FOR GRANTING THE WRIT

Your Petitioner believes that all of the most cogent reasons favoring the allowance of a Writ of Certiorari exist in the instant case and will discuss *seriatim* these following reasons:

1. There are direct conflicts between the Fourth Circuit's opinion and decisions of this Court.

2. There is a direct conflict between the Fourth Circuit's opinion and a decision by another United States Circuit Court of Appeals, a conflict in principle with other decisions of the Fourth Circuit, and a direct conflict with two United States District Court opinions.

3. There is a direct conflict between the Fourth Circuit's opinion and the opinions of Maryland's highest courts on an important question of State law.

---

[13] The order denying rehearing in banc is printed in Appendix B hereto at 3a.

[14] The order granting Petitioner's motion for stay of mandates is printed as Appendix A hereto at 1a.

4. The Fourth Circuit's opinion decides important questions of federal law which have not been but should be decided by this Court.

5. The Fourth Circuit's manner of considering this case so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

I.

CONFLICTS WITH DECISIONS OF THIS COURT.

Title 28 U.S.C. §2254(a) mandates that a federal judge "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only* on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." (Emphasis added.) In his federal petition, Respondent, one in custody pursuant to the judgment of a Maryland State court, raised as his sole claim for relief that the decision in *Long v. Robinson*, 316 F. Supp. 22 (D. Md. 1970), *aff'd*, 436 F.2d 1116 (4th Cir. 1971), should be applied retroactively to his case so as to invalidate his incarceration upon his plea of guilty in the Criminal Court of Baltimore. However, this Court has reiterated in *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), its now forty-year-old holding that "the Constitution neither prohibits nor requires retrospective effect" for decisions expounding new constitutional rules. *Accord, Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

Accordingly, as was pointed out by the District Court below in denying a certificate of probable cause to appeal, Respondent's federal habeas corpus petition, raising only a retroactivity contention, failed to present a claim that he was in custody in violation of federal law as is required by 28 U.S.C. §2254(a). Thus it is manifest that the Fourth

POOR COPY

Circuit's opinion considering Respondent's retroactivity contention on its merits presents a direct and irreconcilable conflict with this Court's opinions in *Linkletter* and *Sunburst*. Equally clear is that under 28 U.S.C. §2254(a) the Circuit Court lacked jurisdiction to entertain Respondent's retroactivity claim at all!

Moreover, it is evident that the Fourth Circuit's opinion presents a direct conflict with this Court's decision in *Picard v. Connor*, 404 U.S. 270 (1971), as well as a conflict in principle with this Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971). In *Picard*, this Court decided that although the requirement of exhaustion of state judicial remedies reflects a policy of federal-State comity, 28 U.S.C. §2254(b) & (c) commands adherence to that policy: "We emphasis that the federal claim must be *fairly presented* to the state courts . . . [i]f the exhaustion doctrine is to prevent 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.'" 404 U.S. at 275. (Emphasis added; citation omitted.) And in *Younger*, Mr. Justice Black spoke for the Court, expounding at great length on the notion of comity as expressed in the phrase "Our Federalism." *See Younger v. Harris, supra*, at 44-45 ("[T]his slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history *and* its future" and "represent[s] . . . a system in which . . . the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that *will not unduly interfere* with the legitimate activities of the States.") (emphasis supplied).

However, as was pointed out in Your Petitioner's statement of the case herein, Respondent's retroactivity con-

tention was never presented in any way to Maryland's State courts, much less "fairly presented." In *Greene v. State*, 11 Md. App. 106, 273 A.2d 30 (1971), and in *Franklin v. State*, 264 Md. 62, 285 A.2d 616 (1972), Maryland's highest courts did not resolve the question of the retroactivity of *Long v. Robinson, supra*; they merely respected the findings of the federal courts in *Long* of unconstitutionality, and of May 15, 1969, as the effective date of the decision. Both Greene and Franklin were indisputably members of the class entitled to relief under *Long* and neither of them briefed or argued or in any way presented the retroactivity issue.

By contrast, Respondent, who is not a member of the *Long* class and who has never asked for relief in the State's courts, still has an opportunity to present his retroactivity claim in a post-conviction proceeding in Maryland's courts where he would be guaranteed a full hearing with the assistance of counsel. *See Vernon v. Warden*, 11 Md. App. 340, 274 A.2d 405 (1971); MD. R.P. BK42 & BK44a (a hearing with the assistance of counsel is mandatory on a first petition for post-conviction relief). Thus, Maryland submits that to expect her to liberally grant post-appellate procedures for collaterally attacking criminal convictions on one hand, and for a federal court to not defer consideration of such claims until the State's procedures have been exhausted on the other, is contrary to both the letter and spirit of *Picard* and *Younger*, as well as contrary to the command of 28 U.S.C. §2254(b) & (c).[15]

---

[15] Whatever merit Respondent's argument that his failure to exhaust his effective state judicial remedies was excusable once had, that merit was substantially diminished, if not entirely eliminated, by his release on parole on March 7, 1972. Maryland respectfully suggests that to ask Respondent to exhaust his effective state judicial remedies under these circumstances is a small price to pay for the maintenance of our federal system.

BLEED THROUGH POOR COPY

In addition, assuming for the purpose of this argument that retroactivity principles were properly applicable to Respondent's case, the State suggests that after correctly setting forth the general rules governing retroactivity as enunciated in *Linkletter v. Walker, supra,* and *Williams v. United States,* 401 U.S. 646 (1971), the Fourth Circuit's opinion so misapplies these rules as to in effect adopt a new rule for Respondent's case in conflict with the pertinent decisions of this Court. The rule as initially stated by the Circuit Court is as follows: "The basic factor considered in deciding whether to apply a decision retroactively has been the effect which the denial of rights or procedures subsequently ruled to be constitutionally mandated might have had on the accuracy of the guilt determining process in prior trials." 465 F.2d at 51, App. C at 6a. However, the opinion goes on to admit that "It is true, as the state contends, that the unconstitutional treatment of petitioners does not relate to the accuracy of the fact finding function of the judicial process." 465 F.2d at 52, App. C at 8a. Notwithstanding this, in almost the same breath, the Circuit Court makes the conflicting statement: "To deny juveniles in Baltimore the opportunity of such a defense [diminished responsibility as a juvenile] and to allow it to all other juveniles in Maryland seems to us so fundamentally unfair as to impeach the validity of the 'adult' proceedings and render unreliable the guilty verdicts obtained in these proceedings." 465 F.2d at 52, App. C at 8a-9a. (Footnote omitted.) That the Fourth Circuit's statement of its conclusion conflicts with this Court's pronouncements on retroactivity law is, Your Petitioner suggests, clear. Maryland also adverts to the Circuit Court's failure to even mention the application to Respondent's case of the important factors of the good faith reliance by State officials on the old rule and the burden on

the administration of justice attendant to retroactive application of the new rule. *Cf. Adams v. Illinois,* 405 U.S. 278 (1972).

II.

CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS.

In *Lamb v. Brown,* 456 F.2d 18 (10th Cir. 1972), the United States Court of Appeals for the Tenth Circuit considered a case directly analogous to Respondent's. At issue was the constitutionality of an Oklahoma statute which set different juvenile jurisdictional age limits, not as in *Long* on the basis of locality, but on the basis of sex. Although the Tenth Circuit held the classification in question to be unconstitutional, it specifically declined to apply the decision retroactively. 456 F.2d at 20. *See also, Acuna v. Baker,* 418 F.2d 639 (10th Cir. 1969); *United States v. Wilkerson,* 262 F. Supp. 596 (D.D.C. 1967). Accordingly, it is important to note that although the juvenile classification questions in these cases may facially appear to be of limited application, that these cases are just the first two of many decisions which will undoubtedly consider the now novel question of the applicability of retroactivity principles to decisions holding State classifications irrational as of a recent date and thus violative of equal protection of the laws. That the first two United States Circuit Courts of Appeals which have treated this issue have arrived at conflicting results only serves to highlight the importance of this now novel question.

In addition, the Circuit Court's decision below conflicts in principle with other decisions of the Fourth Circuit. In regard to the exhaustion of state judicial remedies question, another panel of the Circuit, in *Ferguson v. Cox,* 464 F.2d 461 (4th Cir. 1972), decided shortly before Re-

spondent's case, paid heed to *Picard v. Connor, supra,* and required strict exhaustion of state judicial remedies. As stated by Judge Sobeloff in *Ferguson*: "Mere formal compliance with . . . accepted procedures is not necessarily the talisman of exhaustion. Consideration must be given to whether the claimed constitutional errors were adequately presented to the highest court in the state for review." 464 F.2d at 463. Also, as to the retroactivity issue, the Fourth Circuit in *Brady v. Superintendent,* 443 F.2d 1307, 1313 (4th Cir. 1971), cited this Court for the proposition that "The Maryland courts have a large measure of discretion in deciding the time from which a new legal principle is to be declared controlling. Jenkins v. Delaware, 395 U.S. 213, 218, 89 S. Ct. 1677, 23 L. Ed. 2d 253 (1969)," but the panel in Respondent's case failed to apply these standards set forth in *Brady* and *Jenkins.*

Yet another indication of the importance of the questions here presented is the directly contrary holdings on the retroactivity issue by the District Court in *Long v. Robinson, supra,* and by the District Court below.

III.

CONFLICTS WITH MARYLAND'S HIGHEST COURTS.

Although Maryland does not believe that she should properly have been bound for exhaustion purposes by her courts' dicta as to *Long's* non-retroactivity in *Greene* and *Franklin,* or for that matter that retroactivity principles are properly applicable to Respondent's case, she maintains that if she is to be so bound and if such principles are to be so applied, that federal courts are required by this Court's decision in *Jenkins v. Delaware,* 395 U.S. 213 (1969), to defer to her judgment of the retroactivity question absent a clearly demonstrated abuse of discretion. Moreover, as the Fourth Circuit's opinion did bind the State by her

courts' non-retroactivity dicta and inasmuch as *Linkletter* clearly demonstrates that this issue does not present a federal constitutional question, it is here submitted that the Circuit Court's decision in Respondent's case presents an irreconcilable conflict with the State's courts on a most important question of State law.

IV.

THE NEED FOR THIS COURT TO DECIDE IMPORTANT QUESTIONS OF FEDERAL LAW.

Your Petitioner submits that this case presents at least three important questions of federal law which have not been but should be decided by this Court. The first of these questions relates to the proper interpretation of 28 U.S.C. §2254(b). That subparagraph of the section provides that an application for a federal writ of habeas corpus from one in custody under the judgment of a State court shall not be granted except if "it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." From this language, some of the inferior federal courts have developed what has become known as the "futility doctrine." This phrase allows a federal court to find "the existence of circumstances rendering such [State corrective] process ineffective to protect the rights of the prisoner," by analyzing the State court's substantive holdings of federal law and concluding that an application by the prisoner for relief in the State's courts would be futile (which is equated with unsuccessful). *See Woodall v. Pettibone, supra,* at 51, App. C. at 6a. *See also James v. Copinger,* 441 F.2d 23 (4th Cir. 1971); *Hayes v. Boslow,* 336 F.2d 31 (4th Cir. 1964), *cert. denied,* 386 U.S. 1039 (1967); *Evans v. Cunningham,* 335 F.2d 491 (4th Cir. 1964);

POOR COPY

Reed v. Beto, 343 F.2d 723 (5th Cir. 1965), *aff'd on other grounds sub nom. Spencer v. Texas*, 385 U.S. 554 (1967).

In this regard, it is becoming increasingly obvious that frivolous prisoner filings are on the verge of burying the lower federal judiciary. In 1970, total prisoner filings reached nearly 16,000 with State habeas corpus cases constituting 9,063 of the total prisoner cases filed. 1971 ANN. REP. OF DIR. OF AD. OFF. OF U.S. COURTS 132. Nineteen years ago Mr. Justice Jackson stated his great concern over "the floods of stale, frivolous, and repetitious petitions [for federal habeas corpus by State prisoners] which inundate the docket of the lower courts and swell our own." *Brown v. Allen*, 344 U.S. 391 (1963) (concurring opinion). Ironically, in that year only 541 such petitions were filed. Despite the fact that the astronomical spiral of the last twenty years now appears to be leveling off, quite likely due in substantial measure to the vast improvements made by many States in their judicial and post-conviction procedures, it can be said with certainty that such prisoner filings still constitute a disproportionately large segment of the federal civil docket.

Accordingly, Your Petitioner submits that persons in State custody should be encouraged to utilize — not bypass — the effective post-conviction remedies increasingly offered by many States. Regrettably, the erroneous opinion by the Fourth Circuit in Respondent's case will if not corrected have far-reaching consequences by encouraging increasingly great numbers of habeas corpus petitions from State prisoners seeking to bypass adequate state judicial remedies in favor of federal court intervention. Perhaps more unfortunately, the apparently increasing willingness of federal courts to excuse the exhaustion of state judicial remedies requirements of 28 U.S.C. §2254(b) & (c) seems to be prompted by an unspoken assumption

that the courts of the States are somehow unable or unwilling to protect prisoners rights.

While rare cases that came to light many years ago may have justified that view in part then, Your Petitioner submits that the assumption is today entirely unwarranted, particularly when applied to a State such as Maryland which offers persons in its custody an opportunity for meaningful appellate and post-appellate review of their confinement. Maryland's Post Conviction Procedure Act, for example, in addition to considering claims as expansive as those which may be asserted in federal habeas corpus, guarantees unlike the federal procedure, a first-petitioning prisoner, whatever the merit of his claim, a full hearing with the assistance of counsel.

Petitioner respectfully suggests that this Court has never embraced the "futility doctrine" as now interpreted by some federal courts and that the penchant of those courts for prognosticating an applicant's chances for success in the State's courts amounts to an unwarranted judicial amendment to Congress' clearly expressed directive to the contrary. As such, Petitioner submits that apart from the correctness of the federal courts' guess in Respondent's case, that the true purport of 28 U.S.C. §2254(b) constitutes an important question of federal law which has not yet been but should be decided by this Court.

Another important question of federal law which this Court should decide is the proper application of a decision holding a statutory classification irrational as of a recent date and therefore unconstitutional as a denial of equal protection of the law. No better illustration of the problem exists than the instant case. *Long v. Robinson, supra,* merely held that as of the date of its filing, May 15, 1969, Maryland's defining of juveniles as persons under sixteen

in Baltimore City but under eighteen in the rest of the State represented a classification having no rational basis and thus denied equal protection of the laws. But by holding *Long* fully retroactive upon an empty record, the Fourth Circuit has *sub silentio* made an entirely unjustifiable presumption: namely, that the classification struck down by *Long* was always without a rational basis in fact. In this regard, however, *Long* made no such finding, nor did Respondent ever file affidavits or otherwise offer evidence to substantiate this hidden linchpin of his — and now the Fourth Circuit's — argument!

In the instant case the State suggests that when the statewide juvenile age limit was set at eighteen in 1941 and Baltimore City was exempted and allowed to retain the sixteen-years'-old age limit which had been in effect in that municipality since 1902, that the obvious raional basis for the classification was the considered judgment by Maryland's General Assembly, its State legislature, that urban youth — Baltimore City was the only truly urban locality in Maryland in 1941 — matured more quickly than youth raised in rural areas. That recent increased urbanization throughout Maryland and inversions in population distribution caused by rural dwellers' moving into the cities while urbanites moved to suburbia does not undercut the rational basis for the classification when established in 1941. Nevertheless, the Circuit Court's opinion overlooks these obvious facts and upon a record void of any evidence presumes to hold *Long* fully retroactive.

Maryland respectfully dissents and suggests that the proper procedure to be followed in such a case, seeking to extend retrospectively the application of a decision finding a denial of equal protection as of a recent date, is to require the plaintiff to prove the irrationality of the classification *when applied to him* before traditional retro-

activity principles are utilized to determine the ultimate question posed. Your Petitioner further submits that this problem presents a novel and important question of federal law properly deserving resolution by this Court.

Yet another aspect of the Circuit Court's opinion decides a different but equally novel and important question of federal law appropriate for this Court's final determination. This question is whether in granting habeas corpus relief to an applicant in State custody a federal court may, as has the Fourth Circuit here, order the expunction after verdict and judgment of a State's records relating to good faith criminal prosecutions undertaken in full compliance with then existing law. Petitioner submits that the overwhelming weight of authority supports the proposition that habeas corpus is available only to effect a petitioner's discharge from custody. *Fay v. Noia*, 372 U.S. 391, 427 n. 38 (1963) (dictum); *McNally v. Hill*, 293 U.S. 131, 136-37 (1934) (dictum), *overruled* (to the extent of allowing inquiring into custody to commence in the future) *by Peyton v. Rowe*, 391 U.S. 54 (1968).

Although 28 U.S.C. §2243 authorizes the federal court to "dispose of the matter as law and justice require," there is no legislative history to suggest a specific purpose underlying either phrase, and certainly there is no evident intent to alter the common law limits of the writ by expanding the relief available to a habeas petitioner. Accordingly, Your Petitioner submits that this Court should properly decide the extent of the relief a federal court may order in granting a State prisoner's petition for a writ of habeas corpus.

V.

THE NEED FOR THIS COURT TO EXERCISE ITS POWER OF SUPERVISION.

At oral argument of Respondent's case, the Circuit Court panel over the State's written objection accepted and subsequently considered data tendered by Respondent's counsel. The panel also accepted a number of affidavits then offered on the State's behalf. It further considered other statistical data and various letter memoranda submitted under dates of May 15, 17, and 26, and June 1, 9, 19, 20, and 29, 1972. Respectfully, Your Petitioner suggests that the facts bearing on the determination of the crucial issues raised by Respondent's petition required development in Maryland's courts and/or in the United States District Court. Therefore, it is submitted that at the very least this Court should exercise its supervisory power to remand the case for ascertainment of the relevant facts relating to the existence of a rational basis for Maryland's classification when applied to Respondent, as well as to develop, if appropriate, evidence relating to the application of traditional retroactivity criteria to Respondent's case.

CONCLUSION

For the reasons hereinabove set forth, it is apparent that a decision by this Court to grant the Writ of Certiorari and to review this case would enable this Court to resolve serious and important conflicts between the Circuit Court opinion below and (1) decisions of this Court, (2) the decision of another United States Circuit Court of Appeals, (3) the decisions by other panels of the Fourth Circuit, (4) decisions by two United States District Judges, and (5) decisions by Maryland's highest courts. It would also enable this Court to give consideration to important and novel questions of federal law requiring final resolution

by this Court. These conflicts and questions are of vital importance to all States in the good faith execution of their laws and to many persons in custody pursuant to State court judgments.

Accordingly, a Writ of Certiorari should issue to review the opinion and judgment herein of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
JOHN P. STAFFORD, JR.,
Assistant Attorney General
of Maryland,
DAVID H. FELDMAN,
Assistant Attorney General
of Maryland,
Counsel for Petitioner.

or this Court. These conflicts and questions are of vital importance to all States in the good faith execution of their laws and to many persons in custody pursuant to State court judgments.

Accordingly, a Writ of Certiorari should issue to review the opinion and judgment herein of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Thomas B. Finan,
Attorney General of Maryland,

Edward F. Borgerson,
Assistant Attorney General of Maryland,
Chief, Criminal Division,

James H. Strawbridge, Jr.,
Assistant Attorney General of Maryland,

David H. Feldman,
Assistant Attorney General of Maryland,

Counsel for Petitioner

APPENDIX A

[Unreported]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1242

Kenneth Woodall, #B-1-103228,
Appellant,

versus

John M. Pettibone, Director, Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services,
Appellee.

No. 72-1264

Kenneth Woodall, #B-1-103228,
Appellee,

versus

John M. Pettibone, Director, Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services,
Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore.

Upon consideration of the motion of the appellee-cross appellant, John M. Pettibone, Director, Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services, and the opposition to the motion, by counsel,

IT IS ORDERED that the mandates are stayed pending application of the appellee-cross appellant, John M. Pettibone,

Director, Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services, in the Supreme Court of the United States for a writ of certiorari provided the application is filed within the time permitted by law.

For the Court — by direction.

s/ SAMUEL W. PHILLIPS,

Clerk.

(Filed September 21, 1972)

APPENDIX B

[Unreported]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1242

Kenneth Woodall, #B-1-103228,
Appellant,

versus

John M. Pettibone, Director, Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services,
Appellee.

No. 72-1264

Kenneth Woodall, #B-1-103228,
Appellee,

versus

John M. Pettibone, Director, Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services,
Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore
Herbert F. Murray, District Judge.

ORDER

After careful consideration, and with the concurrences of Judge Boreman and Judge Blatt, and no member of the court having requested that the court be polled on the suggestion for rehearing en banc, it is ordered that the petition for rehearing be, and it hereby is, denied.

s/ J. BRAXTON CRAVEN, JR.,
United States Circuit Judge.

(Filed September 8, 1972)

APPENDIX C

[Reported: 465 F.2d 49 (4th Cir. 1972)]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1242

Kenneth Woodall, #B-1-103228,
Appellant,

versus

John M. Pettibone, Director, Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services,
Appellee.

No. 72-1264

Kenneth Woodall, #B-1-103228,
Appellee,

versus

John M. Pettibone, Director, Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services,
Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore
Herbert F. Murray, District Judge.

(Argued May 12, 1972 Decided August 8, 1972)

Peter S. Smith, Baltimore, Md. (John E. Katz, Jr., and Piper & Marbury, and Michael A. Millemann, Baltimore Legal Aid Bureau, Inc., Baltimore, Md., on brief), for appellant Kenneth Woodall.

BLEED THROUGH POOR COPY

David H. Feldman, Asst. Atty. Gen. (Francis B. Burch, Atty. Gen. of Maryland, Edward F. Borgerding, Asst. Atty. Gen. Chief, Crim. Div., John P. Stafford, Jr., Asst. Atty. Gen. of Maryland, on brief), for appellee John M. Pettibone.

Before BOREMAN, Senior Circuit Judge, CRAVEN, Circuit Judge, and BLATT, District Judge.

CRAVEN, Circuit Judge:

The question presented by this appeal is whether Long v. Robinson, 436 F.2d 1116 (4th Cir. 1971), is to be given retroactive effect. We think that it should be applied retroactively but that practical considerations require case-by-case application and prevent according general blanket relief automatically to all persons affected.

In Long v. Robinson, 316 F. Supp. 22 (D. Md. 1970), the district court held unconstitutional the Maryland laws[1] which required persons 16 and 17 years old who were arrested for crimes committed in Baltimore City to be tried as adults, when persons of the same age arrested for crimes committed anywhere else in Maryland would initially come within the jurisdiction of the juvenile courts.[2] This court affirmed the ruling of unconstitutionality on the opinion of the district court, *Long, supra,* 436 F.2d at 1118, but reserved the question of retroactivity, because, since *Long* was a class action, the proper class to whom it would apply would be those persons "whose convictions had not become final as of * * * May 15, 1969." *Long, supra,* at 1120. Woodall, whose conviction for robbery with a deadly weapon became final before that date, raises the issue of retroactivity reserved in *Long* in his petition for habeas corpus.

---

[1] Md. Code, Art. 26 §§ 51-71 (1957) exempted Baltimore City from the general statewide juvenile age limit of 18, and Art. 4 § 240(b) of the Charter and Public Laws of Baltimore City fixed the juvenile age limit at 16.

[2] An exception to this general rule was that persons over 14 arrested for crimes which carried the death sentence or life imprisonment were to be tried as adults. Md. Code, Art. 26 § 70-2(d)(1). Since this exception applied regardless of where the acts occurred, it does not influence this decision.

I.

In opposing his petition in the district court and on appeal, the State of Maryland urges that since Woodall has not applied for state post-conviction relief, his petition should be dismissed for failure to exhaust state court remedies. We think the district court properly rejected this defense. It is clear that the State of Maryland has accepted the reasoning of *Long* concerning the unconstitutionality of the laws in question. Greene v. State, 11 Md. App. 106, 273 A.2d 830 (1971), and has adopted the date of May 15, 1969, as the cut-off point for retroactivity. Franklin v. State, 264 Md. 62, 285 A.2d 616 (1972). That the question of retroactivity was not briefed and argued before the Maryland Court of Special Appeals and the Maryland Court of Appeals, the highest court of the state, does not convince us that the Maryland Courts did not mean what they said. Whether or not they were specifically asked to decide the question of retroactivity, they have done so. Exhaustion does not require an exercise in futility. 28 U.S.C. § 2254(b); Evans v. Cunningham, 335 F.2d 491 (4th Cir. 1964).

II.

Since the Supreme Court first expressly approved the prospective application of constitutional decisions, Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965), the basic factor considered in deciding whether to apply a decision retroactively has been the effect which the denial of rights or procedures subsequently ruled to be constitutionally mandated might have had on the accuracy of the guilt determining process in prior trials. This approach is summarized in Williams v. United States, 401 U.S. 646, 653, 91 S. Ct. 1148, 1152, 28 L. Ed. 2d 388 (1971), as follows:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance

BLEED THROUGH POOR COPY

by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends. In these situations the new doctrine raises no question about the guilt of defendants convicted in prior trials. [Footnote omitted.][3]

Although the principle elucidated in *Williams, supra,* was distilled from cases dealing primarily with violations of the Bill of Rights, we think it is equally applicable to violations of the right to equal protection of the laws secured by the Fourteenth Amendment.

The decision in *Long* established that the equal protection of the laws was denied by the Maryland laws[4] which required that those persons 16 and 17 years old arrested for acts committed in Baltimore City be tried as adults in the Baltimore Criminal Court, when persons the same age arrested for acts anywhere else in Maryland would be first subject to the jurisdiction of the juvenile court system.[5]

---

[3] Stovall v. Denno, 388 U.S. 293, 297, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), indicated that the retroactivity of newly formulated constitutional rules of criminal procedure was to be decided by weighing the purpose of the new rule, the extent of reliance on the old rules by law enforcement officials, and the effect that a retroactive application of the new rule would have on the administration of justice. We think the summarization in Williams, *supra,* more accurately reflects the fact that it is the accuracy of the truth finding process which, is of paramount importance in decisions of retroactivity. *See* Williams, 401 U.S. at 652-656, 91 S. Ct. at 1152-1153, 28 L. Ed. 2d at 394-396, n. 5 and 7, for a summary of constitutional decisions held retroactive or prospective in different areas of criminal law.

[4] *See* note 1, *supra.*

[5] It is true that the juvenile court can, upon motion by the state, waive its jurisdiction to the adult criminal courts, Md. Code, Art. 26 § 70-16(b) (1971 Cum. Supp.), but such a waiver can be granted only after a full due process hearing, Kemplen v. Maryland, 428 F.2d

Long v. Robinson, 316 F. Supp. 22 (D. Md. 1970). Even if it were found that a defendant had done the acts complained of, this court thought that laws which absolutely foreclosed to certain persons the advantages[6] of being treated as juveniles solely on the basis of the geographical location of the alleged acts created an unreasonable and irrational classification and were therefore unconstitutional.

We think the question of retroactivity is controlled by our decision in Kemplen v. State of Maryland, 428 F.2d 169 (4th Cir. 1970). It is true, as the state contends, that the unconstitutional treatment of petitioners does not relate to the accuracy of the fact finding function of the judicial process. But as we said in *Kemplen*, the normal waiver proceeding is a critical point in the criminal proceedings against a juvenile. It is "the only opportunity an accused has to plead the defense of his diminished responsibility as a juvenile." *Kemplen*, at 177. To deny juveniles in Baltimore the opportunity of such a defense and to allow it to all other juveniles in Maryland seems to us so fundamentally unfair as to impeach the validity of the "adult" proceedings[7] and render unreliable the guilty verdicts ob-

---

169 (4th Cir., 1970), and is not a perfunctory process. That the juvenile court might waive its jurisdiction in an appropriate case does not lessen the unfairness of the system to one who can never get the chance to be subjected first to the juvenile court's jurisdiction.

[6] Notwithstanding the observations of the district court upon the absence in juvenile proceedings of some procedures now considered constitutionally necessary in a criminal trial, Woodall v. Keller, 337 F. Supp. 595, 599 (D. Md. 1972), the general advantages of being accorded juvenile treatment have been well documented. Kemplen v. Maryland, 428 F.2d at 173-74; Long v. Robinson, *supra*. Perhaps the greatest advantage in the long run is that provided by Md. Code, Art. 26 § 61 (1957). "No adjudication by the judge upon the status of any child shall operate to impose any civil disabilities, nor shall any child be deemed a criminal by reason of such adjudication."

[7] We do not think there would be an equal protection objection to treating all 16-year-old people as adults for purposes of criminal liability, nor would such treatment "shock the conscience." The constitutionally impermissible action is making criminal liability more likely for special groups without a rational reason. Thus, contrary to the opinion of the district court. Woodall v. Keller, 337 F. Supp. at 599, the right which Woodall claims is of constitutional dimensions — the right to the equal protection of the laws secured by the Fourteenth Amendment.

tained in these proceedings. We hold, therefore, that Long v. Robinson, 436 F.2d 1116 (4th Cir. 1971), is to be retroactively applied.

III.

In the briefs and at oral argument considerable stress was put by the state's attorney on the enormity of the burden on the state if we required it to discover every conviction which resulted from trials in which defendants in Woodall's position had been subjected to criminal sanctions and expunge them from the records. We impose no such burden on the state.[8]

Expunction is an equitable remedy to be granted in the balancing of the interests of the defendants and the state, see Wheeler v. Goodman, D.C., 306 F. Supp. 58 (1969), and we think that the only fair way to determine whether expunction is required is on a case-by-case method when the issue is raised by one affected by such a conviction, Unlike the situation in which it is determined that certain conduct is constitutionally immune from criminal sanctions, United States v. United States Coin and Currency, 401 U.S. 715, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971), the conduct involved in convictions which *Long* voided was not so constitutionally protected. *See* p. 52 n. 7 *supra*. We think a court of equity, in considering a petition to expunge, should consider, *inter alia*, whether or not waiver to the adult criminal courts would likely have been granted. Always, of course, the extent and nature of the burden of the unconstitutional conviction should be considered.

The diligent efforts of Woodall's counsel aided by the state's attorney have disclosed that there are 37 persons under sentence of imprisonment to regular penal institutions, nine institutionalized in and one paroled from Patuxent Institution, 74 on parole and 39 on probation[9] who will

[8] The district court in Long v. Robinson, 316 F. Supp. at 31, did put the burden on the state to discover all of those people who would be entitled to the benefits of that decision.

[9] We have not included 20 people whose probation to the Municipal Court of Baltimore City will have expired, according to Woodall's counsel, by the time this decision takes effect. To the extent, how-

be affected by this decision, the identities of all of whom are known.

As to these 122 persons, we hold that they are entitled to retroactive application of the rationale of *Long*. In granting relief, the district court will be faced with the same procedural problem encountered in Kemplen v. Maryland, *supra*. For its guidance in further proceedings, we suggest that the application of *Long* to the convictions of these persons in the adult criminal courts should be treated as establishing prima facie a right to have the convictions vacated and declared null and void, provided however, that the state should be afforded the opportunity, either in the Maryland courts or in the United States District Court, to establish nunc pro tunc that the Maryland Juvenile Court Judge would have, because of the facts and circumstances, waived jurisdiction to an adult court. See opinion on petition for rehearing, *Kemplen*, 428 F.2d at 178. *Compare* Franklin v. State, 264 Md. 62, 285 A.2d 616 (1972).

Reversed.

---

ever, that any terms of those probations are still in effect, our decision applies equally to them.

APPENDIX D

[Reported: 337 F. Supp. 595 (D. Md. 1972)]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civ. No. 71-950

Kenneth Woodall, #B-1-103228,
Petitioner,

v.

Gerald A. Keller, Superintendent, Maryland Correctional Institution, Hagerstown, Maryland,
Respondent.

Decided January 31, 1972.

Michael Millemann and Peter Smith, Baltimore, Md., for petitioner.

Francis B. Burch, Atty. Gen. for Maryland, Alfred J. O'Ferrall, III, and David H. Feldman, Asst. Attys. Gen. for Maryland, Baltimore, Md., for respondent.

MEMORANDUM AND ORDER

HERBERT F. MURRAY, District Judge.

On March 28, 1968, the Petitioner, Kenneth Woodall, then seventeen years of age, was sentenced in the Criminal Court of Baltimore City to six years imprisonment upon his plea of guilty to the charge of robbery with a deadly weapon.[1] Petitioner did not seek direct, nor has he sought collateral, review of his conviction, and he thus remains incarcerated in the Maryland Correctional Institution.

[1] At the time of Petitioner's arrest for this offense he was sixteen years old. His date of birth is December 22, 1950.

At the time of his conviction, Petitioner, under the law, was an adult, the juvenile age limit in Baltimore at that time being sixteen. However, two years later, in the case of Long v. Robinson, Judge Watkins of this Court declared (316 F. Supp. 22, 30):

> ". . . the exemption of Baltimore City from the provision of Article 26, section 70-1(c) of the Maryland Code of Public General Laws defining a child as a person who has not reached his eighteenth birthday, and the provision of Article 4, section 240(b) of the Public Local Laws of Baltimore City, setting a juvenile age of sixteen years, are and each of them is, in contravention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and are invalid."

The Court based the ruling upon its conclusion that

> "Whatever may have been the original justification for the exclusion of sixteen and seventeen year olds arrested in Baltimore City from the scope of the Juvenile Court Act, the uncontroverted evidence is that such basis no longer exists. . . ."[2]

The Court held that its decision would apply to all cases not finally decided on May 15, 1969, the date of filing in that suit.[3] In setting that date, Judge Watkins stated that since the ". . . disruption resulting from this decision will inevitably be severe, . . . the court accordingly declines to make the decision retroactive beyond May 15, 1969." *Long, supra*, at 31. Although the implication of that statement would seem to preclude challenge by persons whose convictions had become final prior to May 15, 1969, the Fourth Circuit Court of Appeals dispelled that conclusion in an

---

[2] Long v. Robinson, 316 F. Supp. at 28.

[3] The court defined a case to be "finally decided" when the time for direct appeal had expired without appeal having been taken, or if direct appeal had been taken and decision rendered, the date on which certiorari was denied or on which the time to apply for certiorari expired without such an application having been made.

POOR COPY

opinion which affirmed the judgment in *Long*, but declared the plaintiffs therein not to be proper class representatives for persons whose convictions had in fact become final before the effective date of *Long*.[4]

The instant petition for a writ of habeas corpus brings to this Court the precise retroactivity question the Court of Appeals left unanswered. Petitioner, whose case was finally decided on March 28, 1968, contends *Long* should apply to him. Since the identical issue has been recently resolved adversely to the Petitioner in the Maryland state courts, foreclosing his raising the retroactivity issue there, he properly brings the issue here. Evans v. Cunningham, 335 F.2d 491 (4th Cir. 1964); 28 U.S.C. § 2254(b). In this regard the Court notes the opinion in Greene v. State, 11 Md. App. 106, 273 A.2d 830 (1971), which accepted the reasoning in *Long* declaring the challenged statutes invalid and which expressly held *Long's* effective date of May 15, 1969, to be controlling in cases finally decided prior thereto. The selection of that date for the purpose of determining retroactivity under the holdings in *Long* and Greene v. State, *supra*, was approved by the Maryland Court of Appeals in Franklin v. State, Md., 285 A.2d 616 (January 10, 1972).

The Court views the retroactivity question presented here to be a novel one in several respects. Because the result of a retroactive application, as urged herein, would suggest the release of many persons long since validly convicted of criminal offenses, the Court has found it informative to review those cases in which retroactivity was at issue and in which the convictions were alleged to be invalid due to constitutional defect. The Court has found that the Petitioner's case cannot be placed squarely within the guidelines of any applicable decision.

The Court notes at the outset that a decision granting or denying retrospective effect to a judicial ruling is neither required nor prohibited by the Constitution. Linkletter v. Walker, 381 U.S. 618, 629, 85 S. Ct. 1731, 14 L. Ed. 2d 601

[4] Long v. Robinson, 436 F.2d 1116, 1120 (4th Cir. 1971).

(1965); Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364, 53 S. Ct. 145, 77 L. Ed. 360 (1932). Further, as to retroactivity there appears to be no distinction drawn between civil and criminal litigation. United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103, 2 L. Ed. 49 (1801); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940); James v. United States, 366 U.S. 213, 81 S. Ct. 1052, 6 L. Ed. 2d 246 (1961).

The Supreme Court has generally held its decisions interpreting constitutional rights in the criminal procedure area to be retroactive whenever the new principle ". . . went to the fairness of the trial — the very integrity of the fact-finding process." Linkletter v. Walker, *supra*, 381 U.S. at 639, 85 S. Ct. at 1743. Upon this basis retroactive application was deemed appropriate in most cases involving denial of the right to counsel, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (trial); Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) (arraignment); Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963) (appeal); White v. Maryland, 373 U.S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963) (preliminary hearing with features of arraignment);[5] Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967) (revocation of probation and deferred sentencing proceedings);[6] Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1969) (preliminary hearing),[7] where the indigency of the accused was a factor involved in alleged infringement of constitutional rights, Griffith v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (free transcript for appeal);[8] where the fairness of the trial was

[5] Held retroactive in Arsenault v. Massachusetts, 393 U.S. 5, 89 S. Ct. 35, 21 L. Ed. 2d 5 (1968).

[6] Held retroactive in McConnell v. Rhay, 393 U.S. 2, 89 S. Ct. 32, 21 L. Ed. 2d 2 (1968).

[7] The Court in Adams v. Illinois, 401 U.S. 953, 91 S. Ct. 981, 28 L. Ed. 2d 236 (1971), granted certiorari to resolve the issue of retroactivity presented by Coleman v. Alabama.

[8] Held retroactive in Eskridge v. Washington State Board of Prison Terms, 357 U.S. 214, 78 S. Ct. 1061, 2 L. Ed. 2d 1269 (1958).

POOR COPY
BLEED THROUGH

vitiated by use of certain evidence, Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) (proscribing state's use of coerced confession), Bruton v. United States, 391 U.S. 128, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (proscribing admission of prejudicial statements of co-defendant in joint criminal trial),[9] Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968) (proscribing use of preliminary hearing testimony of absent witness unless state makes good faith effort to secure the witness's presence);[10] and where an accused was apt to be penalized for his assertion of a constitutional right, Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) (holding double jeopardy prohibition of Fifth Amendment applicable to the states).[11] Conversely, the Court has rejected complete retroactive effect for its constitutional rulings on issues viewed not to have had a prejudicial impact on the fairness of the adjudicative process. *See* Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (rule proscribing state's use of illegally seized evidence;)[12] United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (right to counsel at pre-trial lineup);[13] Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (comment on defendant's failure to testify violates privilege against self-incrimination), reh. denied 381 U.S. 957, 85 S. Ct. 1797, 14 L. Ed. 2d 730 (1965);[14] Desist v. United States, 394 U.S. 244, 89 S. Ct. 1030, 22 L.

---

[9] Held retroactive in Roberts v. Russell, 392 U.S. 293, 88 S. Ct. 1921, 20 L. Ed. 2d 1100 (1968); reh. denied 393 U.S. 899, 89 S. Ct. 73, 21 L. Ed. 2d 191 (1968).

[10] Held retroactive in Berger v. California, 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508 (1969).

[11] Held to be fully retroactive in Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), by virtue of the decision in North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

[12] Held not retroactive in Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965).

[13] Held not retroactive in Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967).

[14] Held not retroactive in Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966), reh. denied 383 U.S. 931, 86 S. Ct. 925, 15 L. Ed. 2d 850 (1966).

Ed. 2d 248 (1969) (prospective effect given ruling requiring police officials to comply with Fourth Amendment in their use of electronic surveillance devices); Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964) (requiring that an accused be advised of right to counsel and to remain silent before police interrogation);[15] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (holding, *inter alia*, that a person in custody must, prior to police interrogation, be clearly informed that he has the right to remain silent, and that anything he says "will" be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation; that if he indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease; and that, if he is indigent, a lawyer will be appointed to represent him),[16] reh. denied California v. Stewart, 385 U.S. 890, 87 S. Ct. 11, 17 L. Ed. 2d 121 (1966). The Court has also made plain its view that according a decision retroactive effect is not a value judgment elevating the constitutional principle involved to a level above those not similarly treated.[17]

In discussing the approach to be employed in determining whether to apply a new constitutional decision retroactively, the Court has set out three primary criteria: 1) the purpose of the new rule; 2) the reliance placed upon the old rule; and 3) the effect of a retroactive application of the new rule upon the administration of justice. Linkletter v. Walker, *supra*, 381 U.S. at 636, 85 S. Ct. 1731, 14

---

[15] *See* note 16, *infra*.

[16] Both Escobedo v. Illinois and Miranda v. Arizona were held to be not retroactive in Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966), reh. denied 385 U.S. 890, 87 S. Ct. 12, 17 L. Ed. 2d 121 (1966).

[17] "We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved . . . [but takes] account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial." Johnson v. New Jersey, supra, note 16, 384 U.S. at 728-729, 86 S. Ct. at 1778.

L. Ed. 2d 601. In weighing the issue now presented to this Court, both the Maryland Court of Special Appeals and the Maryland Court of Appeals considered the standards announced in *Linkletter* in deciding against retroactivity.

This Court, however, does not view Petitioner's claim to be of constitutional dimensions and therefore believes that the *Linkletter* criteria should also be examined in the light of the particular circumstances in which Petitioner's case arose.

It should be noted initially that Petitioner finds no defect, constitutional or otherwise, in the criminal proceeding which resulted in his conviction. In the absence of a contrary showing, this Court must assume Petitioner received the same constitutional protection afforded any other accused in an adult criminal proceeding. Because the constitutional integrity of the adjudicative process which convicted this Petitioner is not in issue, his case cannot be decided squarely upon the rationale of *Linkletter* and the other cases espousing its doctrine.[18]

The Court views the nature of Petitioner's constitutional claim to be derivative. The Court believes the Petitioner does not now have, nor has he ever had, the constitutional right to be treated as a juvenile in the courts of Maryland. If Petitioner ever had any privilege in this regard, it derived exclusively from state statutory authority. No sixteen or seventeen year old had even the statutory right to be accorded juvenile treatment in Baltimore City until this Court declared the statutory exception excluding such

[18] The court finds no merit in Petitioner's contention that Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968) (right to impartial jurors in capital punishment case), reh. denied 393 U.S. 898, 89 S. Ct. 67, 21 L. Ed. 2d 186 (1968), suggests full retroactive effect be given any decision involving a dispositional defect. Not only was the defect in that case held to be of constitutional magnitude, the language of that opinion clearly precludes the result urged by Petitioner here: "Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor . . . does today's holding render invalid the *conviction*, as opposed to the *sentence*, in this or any other case." (emphasis in original). *Id.*, 391 U.S. at n. 21, 88 S. Ct. at 1777.

individuals from Maryland's Juvenile Court Act to be a constitutionally invalid classification. Thus, Petitioner raises here a statutory claim of right which did not exist at the time of his conviction.

Notwithstanding the alleged value of the specialized post-adjudicative treatment a juvenile is supposed to receive,[19] the proceeding in which a juvenile's conduct is judged generally does not offer full range of constitutional safeguards which must attend the various stages of an adult criminal proceeding. *See* In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). Indeed, the disciplining of a juvenile upon a finding of delinquent conduct frequently involves a significantly greater loss of personal freedom than would accompany the conviction of an adult for a similar offense.[20] In view of these circumstances a sixteen or seventeen year old apprehended for a minor offense outside of Baltimore City, prior to the decision in Long v. Robinson, *supra*, could arguably have successfully asserted an equal protection claim, similar to the one in *Long*, in seeking the possibly less harsh commitment consequences and the constitutional protection to be received in an adult criminal court.

As has been indicated, the Court believes it should approach the retroactive issue here from a broader view than merely applying the standards of the Linkletter v. Walker, *supra*, line of cases. In this regard the Court finds the language of Chicot County Drainage Dist. v. Baxter State Bank, *supra*, to be particularly relevant because a primary concern in that case was the retroactivity of a decision

---

[19] Challenges to the validity of juvenile custody have been sustained on the ground that no special treatment was in fact being received. *See* Creek v. Stone, 126 U.S. App. D.C. 329, 379 F.2d 106 (1967); Kautter v. Reid, 183 F. Supp. 352 (D.C.D.C. 1960); White v. Reid, 125 F. Supp. 647 (D.C.D.C. 1954).

[20] In In re Gault, 387 U.S. 1, 29, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), the Court noted that the offense which led to a six year commitment for Gerald Gault would have justified a maximum imprisonment of two months, or a fine of $5 to $50, if it had been committed by an adult.

BLEED THROUGH POOR COPY

which invalidated a statute for its constitutional infirmity, but did not establish a new rule of constitutional interpretation. Speaking for the Court in that case, Chief Justice Hughes declared:

> ". . . broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination." Id., 308 U.S. at 374, 60 S. Ct. at 318.

Upon this basis the Supreme Court has denied retroactive application where an equal protection violation clearly caused forfeiture of a constitutional right. Cipriano v. City of Houma, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969) (voting rights). Furthermore, the above quoted language is ". . . one of the underpinnings of Linkletter v. Walker." United States v. United States Coin & Currency, 401 U.S. 715, 743, 91 S. Ct. 1041, 1056, 28 L. Ed. 2d 434 (1971) (White, J., dissenting).[21]

Because in the instant case the contention that a non-constitutional claim of right has been unconstitutionally withheld is analogous, in terms of the consequences of the relief sought, to the argument that a newly developed rule

---

[21] Mr. Justice White proceeded to comment that it was upon the foundation of Chicot and Linkletter that the Court ". . . fashioned rules to deal with the impact on pending and closed criminal cases of decisions that overruled prior decisions construing the various provisions of the Bill of Rights." 401 U.S. at 744, 91 S. Ct. at 1056.

of constitutional law should be retroactively applied, the Court deems it appropriate to follow relevant principles in both *Linkletter* and *Chicot* in resolving the retroactivity question. The Court does not believe that the decision in *Long, supra,* propounded a new rule of constitutional law. The purpose of that decision was to require that all juveniles similarly situated be afforded the equal protection of the juvenile court statutory scheme. The Court is unaware of any reason, after the opinion in *Long,* which would have prohibited the Maryland legislature from selecting the age of sixteen rather than that of eighteen for the purpose of defining juvenile court jurisdiction throughout the state. The courts and the legislature of Maryland were free to accept or reject this Court's ruling of invalidity,[22] but were persuaded to follow its reasoning.[23] The purpose of the ruling in *Long* has thus been satisfied since the unreasonable classification no longer exists.

The Court concludes that persons whose convictions were finally decided, as that term is defined in *Long supra,* note 3), prior to May 15, 1969, cannot now benefit from the ruling declaring the Baltimore City exemption invalid. As the Maryland Court of Special Appeals noted:

> ". . . any further retroactivity would tend to affect persons who are either now adults or nearing adulthood. As to these persons who have been adversely affected by the denial of treatment as juveniles, the harm has already been done. They have been incarcerated with adults and denied the juvenile probation services at the time when those services would have been most effective." Greene v. State, *supra,* 11 Md. App. at 112, 273 A. 2d at 834.

In adopting the finality date set out in *Long,* the Maryland Court of Special Appeals expressed its desire to minimize the administrative burden any further extension of retro-

---

[22] *See* United States ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970).

[23] The Baltimore juvenile exemption was excised by repeal of Public Local Laws of Baltimore City, Art. 4, Sec. 240, effective June 1, 1969.

activity would produce.[24] Greene v. State, *supra*, 11 Md. App. at 111, 273 A.2d 830. Further, there had been no element of misconduct by police or public officials. Before declaration of its invalidity enforcement officials and the courts had the affirmative duty to comply with the provisions of the Baltimore City exemption. It was for them "an operative fact" which could not be ignored. The later ruling of invalidity cannot affect the fact that Petitioner was then confined for the commission of an anti-social act. He had already been convicted in a state proceeding having full jurisdiction to hear his case. *See* United States v. Williams, 341 U.S. 58, 66, 71 S. Ct. 595, 95 L. Ed. 747 (1951); N.L.R.B. v. Rockaway News Supply Co., Inc., 345 U.S. 71, 77-78, 73 S. Ct. 519, 97 L. Ed. 832 (1953). The Court finds no valid reason to disturb the status "of prior determinations deemed to have finality and acted upon accordingly." The Court is persuaded that whatever interest the State of Maryland might have in sentencing and confining any person convicted of a crime should apply with equal validity to the Petitioner herein.

Leave to proceed in forma pauperis has heretofore been granted.

It is, therefore, ordered for the reasons stated herein that:

1. The Petition of Kenneth Woodall for a Writ of Habeas Corpus be, and the same hereby is, denied.

---

[24] In Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932), the Court rejected the argument that a state could not constitutionally refuse to make its ruling retroactive. Mr. Justice Cardozo held: ". . . a state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Id.*, 287 U.S. at 364, 53 S. Ct. at 148.

APPENDIX E

[Reported: 264 Md. 62, 285 A.2d 616 (1972)]

COURT OF APPEALS OF MARYLAND

No. 282

Marcus A. Franklin,

Appellant,

v.

State of Maryland,

Appellee.

Decided January 10, 1972

Michael Millemann, and Leonard A. Briscoe, Baltimore, for appellant.

Clarence W. Sharp, Asst. Atty. Gen. (Francis B. Burch, Atty. Gen. and Edward F. Borgerding, Asst. Atty. Gen., Baltimore, on the brief), for appellee.

Argued before HAMMOND, C. J., and BARNES, McWILLIAMS, FINAN, SINGLEY, SMITH and DIGGES, JJ.

HAMMOND, Chief Judge.

Appellant Franklin, who was sixteen years old in 1969 when the offense was committed, was tried for and convicted of robbery with a deadly weapon in the Criminal Court of Baltimore when he was seventeen. Both when he was charged and when he was convicted, Md. Code 1957 (1969 Cum. Supp.), Art. 26, § 70-1(c), defined a child subject to the laws governing juvenile cases as a person under the age of sixteen, whereas the law applicable to the counties of Maryland made persons under the age of eighteen juveniles. Since he was not a juvenile in Balimore City, Franklin was not brought before the Juvenile Court for

the crime he committed in the City and, of course, there was no waiver of jurisdiction by the Juvenile Court. Section 70-2 of the Art. 26 of the Code gives "exclusive original jurisdiction" to the Juvenile Court over a delinquent child — the definition of which includes one who has committed an act which would be a crime if done by a person who is not a child. Under §70-16 of Art. 26 that exclusive original jurisdiction (with certain limitations not here pertinent) may be waived, and the child may be held for trial under the regular procedures of the court which would have jurisdiction of the offense if committed by an adult. Under the statute there must be a waiver hearing and a consideration by the court of these factors:

1. Age of child.
2. Mental and physical condition of child.
3. The child's amenability to treatment in any institution, facility or programs available to delinquents.
4. The nature of the offense.
5. The safety of the public.

An order of waiver is a final order and immediately appealable. Section 70-16(d) then provides: "No person, either prior or subsequent to his 18th birthday, shall be prosecuted for criminal offense committed prior thereto unless the case has been transferred as provided in this section."

On August 6, 1970, in Long v. Robinson, 316 F. Supp. 22, the United States District Court for the District of Maryland (Watkins, C.J.) held that the Baltimore City exception to the general Maryland statutory treatment of juveniles that required the trial as adults of sixteen and seventeen year olds arrested for crimes committed in the City was arbitrary and unreasonable and a denial of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. The decision was in terms made applicable to all cases not finally decided on May 15, 1969, the day the suit was filed.

The Court of Appeals for the 4th Circuit affirmed the holding on the constitutional question on the opinion of Judge Watkins, and did not disturb his ruling on retroactive applicability. See Long v. Robinson, 436 F.2d 1116. In Greene v. State, 11 Md. App. 106, 110-111, 273 A.2d 830, 833, the Court of Special Appeals said and held that:

> "Although decisions of the United States District Courts or of United States Courts of Appeals, unlike decisions of the Supreme Court of the United States, are not binding upon this Court, Moon v. State, 1 Md. App. 569, 232 A.2d 277; United States ex rel. Lawrence v. Woods [7 Cir.] 432 F.2d 1072, filed 10/19/70 (CA 7) we are, in this case, persuaded to follow the federal courts on the basis of the testimony produced in Long v. Robinson, *supra* [316 F. Supp. 22]. That case has already produced considerable confusion in the processing of juveniles in the courts of Baltimore; a contrary decision by this Court would simply add to the confusion. In addition, the Legislature has deemed it wise to abolish the exception for Baltimore City as of July 1, 1971, and further attempts to extend the date now appear unlikely.
>
> "Having decided Md. Code, Art. 26, § 70-1(c), insofar as 16 and 17 year old children in Baltimore City are treated differently from all other children of the same age in the state, is invalid, there arises the question of severability. We have no difficulty in deciding that only the exception for Baltimore City is invalid. The intention of the legislature is shown by the presence of a severability clause, Md. Code, Art. 26, § 70-26, and by the repeal of the exception by the legislature, albeit with a delayed effective date. Therefore, the Act is now effective in uniform application throughout the state. See Buckheit v. Buckheit, 10 Md. App. 526, 272 A.2d 54 for a discussion of severability in general.
>
> "In Long v. Robinson, *supra*, the trial court held its decision applicable to all cases not finally decided on May 15, 1969, the date of institution of the proceedings therein. Although the decision in this respect was af-

BLEED THROUGH POOR COPY

firmed on appeal, the appellate court did so on the basis that the class action suit involved there could affect only those persons whose convictions had not become final on such date. It specifically reserved the question as to whether or not it would apply to those persons whose convictions had become final on May 15, 1969.

"We think the administrative dislocation caused by the decision would be reduced if we decided its retroactive application at this time. We hold that the decision is not retroactive to those cases finally decided on May 15, 1969 * * *. We adopt the finality rule applied in Long v. Robinson, *supra* only to keep the administrative burdens at a minimum."

The Court then decided that the criminal court conviction of Greene (who, like Franklin, was sixteen at the time of the crime) would have been "proper" if the Juvenile Court had waived jurisdiction and, without deciding the merits of Greene's appeal from the judgment of the criminal court, remanded the case for the purpose of having a waiver hearing and held (p. 113, 273 A.2d p. 834):

"In the event the Juvenile Court determines not to waive jurisdiction, or if the State decides not to prosecute the case further, trial court is directed to vacate the judgment previously entered in the Criminal Court. If, on the contrary, the Juvenile Court determines to waive jurisdiction, we direct the transcript be returned to this Court for determination of the remaining issue in the case."

It is against this backdrop that Franklin appealed his conviction by the Criminal Court of Baltimore to the Court of Special Appeals, which in an unreported opinion filed February 16, 1971 said:

"Appellant was convicted in the Criminal Court of Baltimore of armed robbery, was sentenced, and appealed. The offense occurred on July 15, 1969.

> "The record shows that appellant was 16 at the time of the offense. For the reasons given in Greene v. State, 11 Md. App. 106 [273 A.2d 830], we remand this case for further proceedings as directed in *Greene*."

The waiver hearing was held and on April 29, 1971 a waiver order was entered. The appeal then came back to the Court of Special Appeals and the Court affirmed the judgment of the Criminal Court of Baltimore, finding in another unreported opinion filed June 29, 1971, that a positive identification in court refuted the claim of Franklin that the evidence was insufficient to support a finding that he was guilty. We granted certiorari to consider and decide whether the Criminal Court of Baltimore had the right and power to try Franklin when it did in the absence of a waiver by the Juvenile Court.

We have concluded that the Criminal Court had neither the right nor the power to try a juvenile who had not been sent to it for trial by the Juvenile Court under the statutory waiver procedures. True, when Franklin was tried the statute law of Maryland on its face and the State and Federal decisions as to legislatively declared geographical classifications in Maryland made it appear that the Criminal Court of Baltimore had jurisdiction to try him on the basis that, for the purposes of trial, he was an adult. But as *Greene*, in reliance on the *Long* decisions, held, he was not such an adult but a child, a juvenile, and as such one who could not be tried in Maryland by a criminal court unless — and only unless — the Juvenile Court so ordered after a proper waiver hearing.

Since the legislature expressly took away the right and power of the criminal court to try a juvenile unless the Juvenile Court waives in favor of a criminal trial, the trial of Franklin was no more than form — it had no substance and no validity and the conviction it produced was a nullity. Compare Thomas v. State, 10 Md. App. 458, 460, 271 A.2d 197, 198 ("But had it been established that a timely appeal had been taken from the action of the Juvenile Court in waiving jurisdiction and ordering Thomas held for

BLEED THROUGH POOR COPY

action of the grand jury, the Criminal Court of Baltimore would have had no jurisdiction over the case pending the disposition of the appeal"). In our view it could not have life breathed into it, and it could not be made valid and effective *nunc pro tunc* by a waiver made by the Juvenile Court after the trial had been had. This reasoning and conclusion show a decent judicial respect not only for the directives of the legislature but for the theory of Blackstone that the law exists independent of judicial decisions and the function of the judge is not to make law but to find it. Mr. Justice Holmes, with characteristic grandeur in the sweep of his phrasing, said in his dissent in Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372, 30 S. Ct. 140, 148, 54 L. Ed. 228: "judicial decisions have had retrospective operation for near a thousand years."

The idea that the judge is a microphone who bindingly broadcasts the words that the unchangeable law has spoken into him and that an overruling decision is not a change of law but a correction of erroneous law, still has sufficient validity, utility value and strength to require us, as we see it, to hold that Greene's recognition and acceptance of the *Long* cases must be given retrospective effect sufficient to wipe out Franklin's trial and conviction by the criminal court. Nevertheless, we realize that in the last hundred years and particularly in the last fifteen or twenty years, courts increasingly have indulged in judicial legislation and, laws, whether made by legislatures or by courts, must be given effective dates and operate only prospectively unless a contrary intention appears. The Supreme Court and indeed, this Court, see Schowgurow v. State, 240 Md. 121, 213 A.2d 475, have set and limited retrospectivity in various cases, by applying guides and standards spelled out in Stovall v. Denno, 388 U.S. 293, 297, 87 S. Ct. 1967, 18 L. Ed. 2d 1199. In Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 731, 14 L. Ed. 2d 601, as in *Schowgurow*, the Court used the date of the decision as the cut-off date. We see no reason why May 15, 1969, the date of finality set out in the *Long* case and adopted by *Greene*, was not an appropriate, proper and valid selection and we approve it.

The State urges that support for the procedures followed by the Court of Special Appeals is furnished by Kent v. United States, 383 U.S. 541, 564, 86 S. Ct. 1045, 1058, 16 L. Ed. 2d 84, 99, and Kemplen v. State of Maryland (4th Cir.), 428 F.2d 169, which followed the suggestions of *Kent* as to what could occur on remand where the criminal trial had followed an apparently constitutionally defective waiver hearing. These cases may offer some support for the course the Court of Special Appeals charted on remand but neither compels us to follow the procedures they viewed as appropriate and we are persuaded that the direction of the Maryland legislature that jurisdiction of a criminal court over a juvenile commences only after a valid waiver of a Juvenile Court, must be respected and followed.

The judgment of the Court of Special Appeals will be reversed, the judgment of the Criminal Court vacated of record, and the case remanded to the Juvenile Court in order that it may determine whether or not a waiver should be ordered. If the Juvenile Court waives, Franklin may be tried by the Criminal Court; if it does not waive, the Juvenile Court will follow the normal procedures prescribed by the statutes for the care and treatment of juveniles under the circumstances.

Judgment reversed and case remanded for further proceedings, costs to be paid by the state.

APPENDIX F

[Reported: 11 Md. App. 106, 273 A.2d 830 (1971)]

COURT OF SPECIAL APPEALS OF MARYLAND

No. 7

Clayton Maurice Greene,

Appellant,

v.

State of Maryland,

Appellee.

Decided January 29, 1971

William F. Gosnell, Baltimore, with whom was Erica L. Gosnell, Baltimore, on the brief for appellant.

Alfred J. O'Ferrall, III, Asst. Atty. Gen., with whom were Francis B. Burch, Atty. Gen., Charles E. Moylan, Jr., State's Atty. for Baltimore City and Josef E. Rosenblatt, Asst. State's Atty. for Baltimore City, on the brief, for appellee.

Argued before MURPHY, C. J., and ANDERSON, MORTON, ORTH, THOMPSON and POWERS, JJ.

THOMPSON, Judge.

Clayton Maurice Greene, the appellant, was convicted by the Criminal Court of Baltimore, Judge Albert L. Sklar presiding without a jury of storehouse breaking and stealing merchandise of the value of $5 or more, the crime occurring on December 11, 1968.

Greene alleges that since, at the time of the crime, he was age 16, his date of birth being September 11, 1952, exclusive jurisdiction to try him was vested in the Juvenile

Court under Md. Code, Art. 26, §§ 51-101 inclusive, in the absence of waiver, Art. 26, §70-16. He contends that the exception contained in Art. 26, § 70-1(c) [Declaring that a child under the jurisdiction of the Juvenile Act is a person who has not reached his 18th birthday, except in Baltimore City, where, until July 1, 1971, such child is defined as a person who has not reached his 16th birthday] is unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and Art. 23 of the Declaration of Rights of Maryland.

We considered this identical question in Graves v. State, an unreported opinion, No. 201, Initial Term, 1967, filed July 21, 1967, where, as in the instant case, no evidence was produced to show an insufficient legislative basis for the classification. *Graves* held that in the absence of such evidence under Stevens v. City of Salisbury, 240 Md. 556, 214 A.2d 775 and Kirkwood v. Provident Sav. Bank of Baltimore, 205 Md. 48, 106 A.2d 103, the presumption of constitutionality of a legislative enactment would prevail. We also relied on the long history in the State of Maryland of the enactment of local laws affecting only some counties and of the exemption of some counties from the operation of general laws, citing Stevens v. State, 89 Md. 669, 43 A. 929; State v. Shapiro, 131 Md. 168, 101 A. 703; Salsburg v. State, 201 Md. 212, 94 A.2d 280 and particularly Salsburg v. Maryland, 346 U.S. 545, 74 S. Ct. 280, 98 L. Ed. 281 sustaining a local law of Anne Arundel County permitting illegally procured evidence in certain trials although inadmissible elsewhere in the State. Although Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 subsequently held all such evidence inadmissible, we considered the *Salsburg* case as precedent for the validity of territorial classifications. We also relied upon McGowan v. Maryland, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 relating to different county laws as to Sunday sales of merchandise. Of course, we were aware the Maryland courts had declared unconstitutional some acts of the legislature where there was no rational basis for territorial distinctions. Maryland Coal & Realty Co. et al. v. Bureau of

Mines, et al., 193 Md. 627, 69 A.2d 471. Dasch v. Jackson, 170 Md. 251, 183 A. 534.

In Long v. Robinson, 316 F. Supp. 22 (affirmed without discussion of the major question by the United States Court of Appeals for the Fourth Circuit, 436 F.2d 1116, decided January 18, 1971) the United States District Court for the District of Maryland found the evidence produced therein sufficient to overcome the general presumption of the validity of a legislative act and held Md. Code, Art. 26, § 70-1(c) unconstitutional. The District Court relied on a report of the Legislative Council Special Committee on Juvenile Courts, January 1966, generally known as the Rasin Committee Report recommending a uniform age of 17 throughout the State. The Report cited that if formerly there were a disparity between children in Baltimore City and children in the counties, there was little to show such differences today. The Report continued:

> "If differentiation of individuals is necessary, as it surely is, it should be made on the basis of facts about the individual, and not on the basis of an assumption about a huge and diverse group such as the youthful population of a city. Whatever differentiation is needed may be made by a court, either by the device of a waiver to the adult criminal court, or by the nature of the disposition following and adjudication of delinquency. The patent unfairness and unjustified inequality which results from the present disparity undermines a basic value of our legal system * * *."

Other evidence in the case was summarized by the trial judge as follows: 316 F. Supp. at 27.

> "The testimony in this case fully supports the conclusion that there is no psychological or physical basis for distinguishing between sixteen and seventeen year olds residing in Baltimore City and in the Counties. Such is the testimony of Robert C. Hilson, Director of the State Department of Juvenile Services, after working with City and County children for a number of years; of Dr. John Hamilton, a licensed medical doc-

tor, practicing psychiatrist, and Director of Clifton T. Perkins State Hospital, who also testified that City children on the whole were less mature than County children, and required more intensive services and attention; James V. Bennett, Director of the Federal Bureau of Prisons for twenty-seven years, and formerly in charge of the National Training School for Boys in Washington, D. C.; and Judge Joseph Howard, a member of the Supreme Bench of Baltimore City, and a former probation officer and social caseworker."

The District Court found no evidence had been produced to show that the difference in classification served any legitimate state objective. The Judge pointed to the consequences following a criminal conviction as an adult such as loss of right to vote and incarceration with adults, as opposed to the consequences of a finding of delinquency under the Juvenile Act, including additional psychological and psychiatric services and the confinement with other children. The Judge also found discrimination in the effect on juveniles whose conduct, although not criminal, evidenced the need for help and attention. Lastly, the Judge pointed out that the legislature of Maryland had applied the Juvenile Act to children between 16 and 18 in Baltimore City by Laws of Maryland, 1966, Chapt. 127, to become effective June 1, 1969, but that the effective date of this legislation had been extended by the Laws of Maryland, 1969, Chapt. 432 to July 1, 1970, and further extended by the Laws of Maryland, 1970, Chapt. 730 to July 1, 1971.

Although decisions of the United States District Courts or of United States Courts of Appeals, unlike decisions of the Supreme Court of the United States, are not binding upon this Court, Moon v. State, 1 Md. App. 569, 232 A.2d 277; United States ex rel. Lawrence v. Woods, 432 F.2d 1072, filed 10/19/70 (CA 7) we are, in this case, persuaded to follow the federal courts on the basis of the testimony produced in Long v. Robinson, *supra*. That case has already produced considerable confusion in the processing of juveniles in the courts of Baltimore; a contrary decision by this Court would simply add to the confusion. In addition, the Legislature

has deemed it wise to abolish the exception for Baltimore City as of July 1, 1971, and further attempts to extend the date now appear unlikely.

Having decided Md. Code, Art. 26, § 70-1(c), insofar as 16 and 17 year old children in Baltimore City are treated differently from all other children of the same age in the state, is invalid, there arises the question of severability. We have no difficulty in deciding that only the exception for Baltimore City is invalid. The intention of the legislature is shown by the presence of a severability clause, Md. Code, Art. 26, § 70-26, and by the repeal of the exception by the legislature, albeit with a delayed effective date. Therefore, the Act is now effective in uniform application throughout the state. See Buckheit v. Buckheit, 10 Md. App. 526, 272 A.2d 54 for a discussion of severability in general.

In Long v. Robinson, *supra*, the trial court held its decision applicable to all cases not finally decided on May 15, 1969, the date of institution of the proceedings therein.[1] Although the decision in this respect was affirmed on appeal, the appellate court did so on the basis that the class action suit involved there could affect only those persons whose convictions had not become final on such date. It specifically reserved the question as to whether or not it would apply to those persons whose convictions had become final on May 15, 1969.

We think the administrative dislocation caused by the decision would be reduced if we decided its retroactive application at this time. We hold that the decision is not retroactive to those cases finally decided on May 15, 1969, finally being defined as in note 1 *supra*. We adopt the finality rule applied in Long v. Robinson, *supra* only to keep the administrative burdens at a minimum.

---

[1] Under the definition, applied by the District Court and approved on appeal, a case is finally litigated when the time for direct appeal expires without an appeal having been taken, or if an appeal has been made, the date on which certiorari was denied by the Supreme Court of the United States, or the time to apply for certiorari has expired without such an application having been made.

The Supreme Court has used a number of different methods of determining the retroactive application of constitutional decisions. In Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601, the Court used the date of the decision and adopted the finality definition as used in note 1 herein. Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 used the date trials began. Desist v. United States, 392 U.S. 244, 89 S. Ct. 1030, 22 L. Ed. 2d 248 used the date illegal electronic surveillance occurred. Stovall v. Denno, 388 U.S. 293, 297, 87 S. Ct. 1967, 1970, 18 L. Ed. 2d 1199 applied the date the illegal confrontations occurred and set out the criteria on the question as follows:

> "* * * (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Of course, if the constitutional question strongly affected determinations of guilt or innocence, the constitutional decision was held to be fully retroactive, as in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799; Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114, and Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811, all concerning the denial of counsel.

The Courts of Maryland experienced in the wake of Schowgurow v. State, 240 Md. 121, 213 A.2d 475 the disruptive effect of a constitutional decision made as retroactive as the rule we are adopting here; however, this Court feels that today's decision will preserve justice without increasing the already considerable administrative uncertainty and confusion.

Reviewing the standards set out in Stovall v. Denno, *supra*, we note that any further retroactivity would tend to affect persons who are neither now adults or nearing adulthood. As to these persons who have been adversely affected by the denial of treatment as juveniles, the harm has already been done. They have been incarcerated with

adults and denied the juvenile probation services at the time when those services would have been most effective. It would serve little useful purpose to now extend this decision to cover these persons.

Under Md. Code, Art. 26, §70-16, a conviction in the Criminal Court of Baltimore would have been proper if the Juvenile Court had waived jurisdiction of the appellant; therefore, pursuant to Md. Rule 1071, we remand the case for the purpose of having such a hearing conducted in accordance with the present provisions of § 70-16. In the event the Juvenile Court determines not to waive jurisdiction, or if the State decides not to prosecute the case further, trial court is directed to vacate the judgment previously entered in the Criminal Court. If, on the contrary, the Juvenile Court determines to waive jurisdiction, we direct the transcript be returned to this Court for determination of the remaining issue in the case.

Case remanded for further proceedings. Mandate to issue forthwith.

APPENDIX G

[Reported: 436 F.2d 1116 (4th Cir. 1971)]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15033

Ronald Lee Long, a minor, by Lewis Daniel Long, his father and next friend, and James Brooks, Jr., a minor by Lillian Brooks, his mother and next friend, individually and on behalf of all other minor children similarly situated, Robert D. Neal, minor, by Annie Neal, his mother and next friend,

Appellees,

v.

Honorable Jerome Robinson, Associate Judge, Municipal Court of Baltimore City and State of Maryland,

Appellants.

Appeals from the United States District Court for the District of Maryland, at Baltimore
R. Dorsey Watkins, Chief Judge

(Argued September 17, 1970. Decided January 18, 1971.)

Alfred J. O'Ferrall, III, Asst. Atty. Gen. (Francis B. Burch, Atty. Gen., of Maryland, Edward F. Borgerding, and Robert A. DiCicco, Asst. Attys. Gen., on the brief) for appellants.

Joseph A. Matera, Baltimore, Md., (Michael Millemann, Baltimore, Md., on the brief) for appellees Ronald Lee Long and James Brooks, Jr., Peter S. Smith, Edwin Villmoare, and Piper & Marbury, Baltimore, Md. (on the brief) for appellee-intervenor Robert D. Neal.

Before BOREMAN, BRYAN and CRAVEN, Circuit Judges.

BOREMAN, Circuit Judge:

The named plaintiffs below (appellees here), who were sixteen years of age at the time of the institution of this litigation, were facing prosecution as adults in Baltimore City for crimes allegedly committed therein. Their complaint requested a declaratory judgment declaring unconstitutional the provisions of Article 4, section 240(b), of the Charter and Public Local Laws of Baltimore City which fixed a juvenile age limit of sixteen years, and that portion of Article 26, sections 51-71, of the Maryland Code of Public and General Laws, exempting Baltimore City from the general statewide juvenile age limit of eighteen years. In addition, the complaint requested an injunction enjoining defendants below (appellants here) from enforcing these laws and an order requiring defendants to expunge all records relating to the arrest of, and criminal charges in Baltimore City against, plaintiffs and the class they represent.

The plaintiffs, by next friends, sued on their own behalf and on behalf of persons similarly situated between the ages of sixteen and eighteen who have been and/or may be charged as adults in Baltimore City for violations of criminal laws and who would have been treated as juveniles under the age of eighteen if charged with similar crimes allegedly committed outside the City of Baltimore. Plaintiffs assert that since persons sixteen and seventeen years old are treated as juveniles in all circuit courts in Maryland except Baltimore City and since plaintiffs are here charged as adults in Baltimore City with the commission of offenses which would come within the jurisdiction of juvenle courts if committed by them in Maryland outside of Baltimore City, they, plaintiffs, are being denied their constitutional rights to equal protection and due process of law under the Fourteenth Amendment.

The district court declared that the laws under attack are unconstitutional. However, the prayer for an injunc-

tion was denied upon the assumption that the decision of the court would be followed unless and until reversed on appeal and that no order of retraint was needed. We affirm the holding of unconstitutionality of the laws in question[1] on the opinion of the district court reported at 316 F. Supp. 22 (D. Md. 1970).

The remaining question for determination is as to the persons to whom this decision should apply. The district court limited the applicability of its decision to "all cases not finally decided on May 15, 1969, the date of the filing of this suit." In Footnote 8 of its opinion, the court explained that "a case is 'finally decided' when the time for direct appeal expires without appeal having been taken, or if direct appeal has been taken and decision rendered, the date on which certiorari was denied or on which the time to apply for certiorari expired without such an application having been made." Both plaintiffs and defendants challenge the court's adoption of this date. Defendants insist that the

---

[1] Subsequent to the presentation of oral arguments we were advised by letter signed by counsel for all parties as follows:

> When this case was originally filed in the United States District Court on May 15, 1969, the plaintiffs challenged the constitutionality of portions of two laws: (1) The provisions of the Maryland Juvenile Causes Act, Annotated Code of Maryland, Article 26, § 51 *et seq.*, which exempt Baltimore City from the uniform juvenile age requirement of eighteen years; (2) The provisions of Article 4, § 240 of the Public Local Laws of Baltimore City * * * excluding sixteen and seventeen year olds in Baltimore City from the scope of the state Juvenile Causes Act. A recent examination of the latter statute (Art. 4, § 240 of the Public Local Laws) has revealed that the Maryland Legislature enacted a law in 1966 (Laws of 1966, Chapter 127) which, *inter alia*, repealed Article 4, Section 240 of the Public Local Laws of Baltimore City. The 1966 repealer provided in Section 5 thereof that "This Act shall take effect on June 1, 1969."

Thus, on the date of the institution of this litigation, and for a period of about fifteen days thereafter, Article 4, section 240, was in effect, but not in effect on the date of the district court's decision.

All counsel agree that the fact that Article 4, section 240, of the Public Local Laws of Baltimore City, is not presently in effect has no bearing on the disposition of this appeal since the major statute involved in this litigation, namely Maryland Annotated Code, Article 26, sections 51-71, is admittedly in full force.

decision should be applied prospectively only, *i.e.*, to cases handled after the date of final decision by this court. Plaintiffs argue that the decision should be made retroactively applicable to the time when a disparity was created in juvenile ages as between Baltimore City and the rest of the State of Maryland.[2]

Although the district court used the term "Retroactivity" to designate the section of its opinion in which it determined the effective date of the decision as May 15, 1969, we think the issue is simply: what persons are proper members of the class entitled to representation by plaintiffs?

As earlier shown herein, in their complaint plaintiffs sought: (1) a preliminary and permanent injunction prohibiting, restraining and enjoining application of the laws under attack; (2) a declaratory judgment declaring unconstitutional the laws in question; and (3) an order requiring defendants to expunge all records relating to the arrest of plaintiffs and the class they represent and records relating to criminal charges against them, *as adults*, in Baltimore City. The district court declared the challenged laws unconstitutional but, instead of issuing an injunction and an expunging order, relied upon the good faith of defendants to refrain from applying the unconstitutional juvenile laws and upon counsel to formulate and adopt a suitable method of expunging records where appropriate.

It is apparent that the district court, notwithstanding its "Retroactivity" characterization, was aware that this case involves not merely one class, but two separate and distinct classes, *i.e.*, persons whose convictions had become final and those whose convictions had not become final.

---

[2] The Charter and Public Local Laws of Baltimore City, art. 4, § 240(b), defined a child as a person under the age of sixteen; the act conferring jurisdiction of Juvenile Causes on the Circuit Court of Baltimore City was passed by the Maryland Legislature in 1943 (Laws of 1943, ch. 118). In 1945, the Maryland Legislature, by Public General Law [Laws of 1945, ch. 797, § 48C], fixed the juvenile age limit at eighteen years statewide, except in certain exempted metropolitan areas. All of the "exempted" areas, other than Baltimore City, now have a juvenile age limit of eighteen years.

We think it is clear that, in class actions involving a challenge to substantive or procedural questions of criminal law, one whose conviction has not become final may not properly claim to represent, as a class, those whose convictions have become final as is here attempted. The members of these two distinct classes stand in different positions and must necessarily seek different remedies; their claims for relief will be addressed to different officials serving in different capacities and will be subject to different defenses. Normally, those whose convictions have become "final" have served their sentences, are on probation or are presently incarcerated. Those who are presently incarcerated may use the civil process of habeas corpus to seek their release from the custody of prison officials. Those whose convictions have become final must seek wholly retrospective relief, *i.e.*, a determination that the declaratory judgment of unconstitutionality is to be applied retroactively to strike down their final convictions and to erase and destroy the records of their convictions as adults. Those whose convictions have not become final stand in a much different position; rather than seeking retrospective relief their remedy is present and, to some extent, prospective in nature, that is, they seek to prevent their prosecution as adults or a final determination of their guilt, as adults, upon appeal. For example, in the instant case, those whose convictions had not become final when this action was instituted could direct their claims for relief to the proper judicial officers to prevent their prosecution as adults or to appellate courts to forestall a final determination of guilt as adults upon appeal. The defense of nonretroactivity obviously could not be interposed by officials who are defendants in an action instituted on behalf of those whose convictions have not become final, as it could be by officials named as defendants in an action instituted on behalf of those whose convictions had become final. The instant case bears no factual similarity to Jenkins v. United Gas Corporation, 400 F.2d 28, 35 (5 Cir. 1968), but apposite is the statement in *Jenkins* that a court in a class action has the duty and the power "both in the conduct of the trial

and relief granted to treat common things in common and to distinguish the distinguishable."

We reach the conclusion that to permit those whose convictions have not become final to represent, as a class, those whose convictions have become final would, in effect, interfere with the court's power to decide that a declaratory judgment of unconstitutionality of a criminal law or procedure should be given prospective application only. This is so simply because relief granted to a class must be granted to all proper members of the class. If the court should determine that members of a class whose convictions have become final are properly represented by one whose conviction has not become final, and if the court granted relief *to the class,* then relief must necessarily be granted to those whose convictions had become final, thereby effectively precluding the courts from deciding any question of nonretroactive application. Otherwise, actions challenging the constitutionality of criminal statutes would be brought routinely as class actions, and, if a holding of unconstitutionality were achieved, the court would be forced to apply its decision to those whose convictions had become final prior to the institution of the action.

We cannot accept such a result. The concept of nonretroactivity is a fiction of criminal law, designed to deny relief to persons who would otherwise be entitled thereto except for the fact that their convictions had become final prior to the particular decision held to be nonretroactive. The retroactivity and non-retroactivity concept has gained acceptance in modern day criminal jurisprudence as a valid means by which to govern the determination of the persons to be affected. As Mr. Justice Clark wrote in Linkletter v. Walker, 381 U.S. 618, 628, 85 S. Ct. 1731, 1737, 14 L. Ed. 2d 601 (1965), "[T]he accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective." This jurisprudential theory and concept should be nurtured and protected. Permitting those whose convictions have not yet become final to represent a class of persons whose convictions have become final

would, in effect, destroy or at least seriously impair the entire concept of retroactivity or nonretroactivity.

In reaching our decision we are not unmindful of decisions of other courts to the effect that in most situations Rule 23 requires only that there be a question of law or fact common to all members of the class and not that all members be identically situated. Broenen v. Beaunit Corporation, 305 F. Supp. 688, 691-692 (E.D. Wis. 1969); Washington v. Lee, 263 F. Supp. 327, 330 (M.D. Ala. 1966); Polakoff v. Delaware Steeplechase and Race Association, 254 F. Supp. 574, 580 (D. Del. 1966); Rosen v. Bergman, 40 F. R.D. 19, 22 (D.C. 1966).

These plaintiffs have obtained a declaratory adjudication that the challenged statutes are unconstitutional. Those whose convictions became final prior to the institution of this suit may seek to benefit from the declaration of unconstitutionality in such forum and by such procedures as may be appropriate.

In sum, we do not think the appeal presently before us actually presents for determination a true retroactivity question. We therefore affirm the district court's limitation of the application of its decision only to those whose convictions had not become final as of the date of the institution of this action on May 15, 1969.

Affirmed.

APPENDIX H

[Reported: 316 F. Supp. 22 (D. Md. 1970)]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

Civ. No. 20779

Ronald Lee Long, a minor by Lewis Daniel Long, his father and next friend, and James Brooks, Jr., a minor by Lillian Brooks, his mother and next friend, individually and on behalf of all other minor children similarly situated,

Plaintiff,

and

Robert D. Neal,

Intervenor,

v.

Honorable Jerome Robinson, Associate Judge, Municipal Court of Baltimore City and State of Maryland,

Defendants.

Decided August 6, 1970

Joseph A. Matera, Acting Executive Director, for Ronald Lee Long.

David R. Packard, Law Reform Unit, Legal Services Program, for James Brooks, Jr.

Michael Millemann, Legal Education Director, Legal Aid Bureau, Incorporated, Baltimore, Md., and Kenneth Johnson, Executive Director, Lawyers' Committee for Civil Rights Under Law, Baltimore, Md., for original plaintiffs.

Edwin S. Villmoare and Peter Smith, Baltimore, Md., for intervening plaintiff Robert D. Neal.

Francis B. Burch, Atty. Gen. Alfred J. O'Ferrall, III, Asst. Atty. Gen., for the State of Maryland, Baltimore, Md., Charles P. Moylan, State's Atty., and Philip E. Epstein, Asst. State's Atty. for Baltimore City, Baltimore, Md., for defendants.

WATKINS, Chief Judge.

This is a suit brought by Ronald Lee Long (Long) and James Brooks, Jr. (Brooks) original plaintiffs, and by Robert D. Neal (Neal) intervening plaintiff (sometimes hereinafter collectively called "plaintiffs") by their respective next friends, purportedly pursuant to United States Code, Title 28, sections 1343(3), 2281 and 2284, Tit. 42, section 1983. Among other things the suit seeks to enjoin the enforcement of, and to have declared invalid, the provisions of Article 4, section 240(b) of the Charter and Public Local Laws of Baltimore City setting a juvenile age limit of sixteen years, and that portion of Article 26, sections 51-71 of the Maryland Code of Public General Laws, excepting Baltimore City from the general statewide juvenile age limit of eighteen (18) years. Juvenile court jurisdiction over sixteen (16) and seventeen (17) year olds therefore exists in circuit courts in all areas of Maryland except Baltimore City. This discrepancy is alleged to contravene the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

The facts are not seriously in dispute, and in large part have (commendably) been stipulated as well as the applicable provisions of the Charter and Public Local Laws of the City of Baltimore, and of the Maryland Code of Public General Laws. The stipulation also recites the agreement that this action is an appropriate class action authorized by rule 23(b) (2) of the Federal Rules of Civil Procedure and that the class which the plaintiffs represent are all persons similarly situated between the ages of sixteen (16) and eighteen (18), and who have been and/or may be charged and prosecuted as adults in Baltimore City for violations of criminal laws promulgated by the State of Maryland and the City of Baltimore and subject to possible

fine and/or confinement as adults, and not entitled to be treated as juveniles, as said class would be treated outside of the City of Baltimore in the remaining counties of the State of Maryland.

It is further stipulated that the plaintiff Long is a Negro minor, born October 28, 1952, and a citizen of the United States and of the State of Maryland, residing in the City of Baltimore and subject to the jurisdiction of the courts of Maryland and of the City of Baltimore.

The said Long, then being a minor sixteen (16) years of age, was arrested on the night of February 11, 1969 and charged with violation of one of the provisions of the criminal code of the State of Maryland, namely Article 27, section 123, Annotated Code of Maryland, relating to the crime of drunkenness and disorderly conduct, in that the said Long had been charged with allegedly failing to obey the lawful command of a police officer.

The said Long is now and has been facing prosecution by the State of Maryland in the Municipal Court of Baltimore City, Criminal Division, for the alleged commission of the said offense, being in said court as an adult. A motion to dismiss on behalf of the plaintiff Long was denied on April 19, 1969, by the defendant, The Honorable Jerome Robinson; and because of the provisions of the state law here being challenged, the plaintiff Long is not entitled to be treated as a juvenile offender nor to be placed under the jurisdiction of the Juvenile Court.

The plaintiff, Brooks, a Negro, born March 16, 1952 and a citizen of the United States and of the State of Maryland, was a resident of Howard County, Maryland, living with his grandmother, where he attended school and worked on a part-time basis.

The said Brooks, then being a minor sixteen (16) years of age left his Harford County residence on the night of February 11, 1969, and was staying with his mother, Lillian Brooks, in Baltimore City because of a medical appointment in the city the next day. The plaintiff was arrested on the night of February 11, 1969 and charged

with the commission of an offense in Baltimore City, namely Article 27, section 123, Annotated Code of Maryland, relating to the crime of drunkenness and disorderly conduct in Baltimore City for allegedly failing to obey the lawful command of a police officer.

The said Brooks, is now and has been facing prosecution by the State of Maryland in the Municipal Court of Baltimore City, Criminal Division, as an adult for the offense allegedly committed and his case is presently pending in said courts. A motion to dismiss, challenging the jurisdiction of said court was denied on April 19, 1969, by the defendant, The Honorable Jerome Robinson; and because of the provisions of the state law being here challenged, plaintiff was not entitled to be treated as a juvenile offender, nor to be placed under the jurisdiction of the Juvenile Court.

The legislative history herein relevant shows that the Charter and Public Local Laws of Baltimore City, creating the Division of Juvenile Causes for the Circuit Court of Baltimore, defines a child as a person under the age of sixteen (16) years (Article 4, section 240 [b]); that the act conferring jurisdiction of Juvenile Causes on the Circuit Court of Baltimore City was passed by the Legislature in 1943, thereby abolishing the offices of Magistrate and Assistant Magistrate for Juvenile Causes in Baltimore City, Laws of Maryland 1943, Chapter 118; that the said act did not alter the juvenile age limit of sixteen (16) years which applied to persons in Baltimore City since 1902; that in 1945, the Legislature by public general law, Laws of Maryland, 1945, Chapter 797, section 48(c), fixed the juvenile age limit at eighteen (18) years in conferring jurisdiction of Juvenile Causes in Circuit Courts of the counties of the state; that the said public general law, when enacted in 1945, did not apply to Baltimore City, Alleghany County, Montgomery County and Washington County; that the exceptions established for Alleghany County, Montgomery County and Washington County have since been eliminated and that the juvenile age limit in each of these counties is eighteen (18) years; that at the present time, the statute

codified in the Juvenile Court Act, Article 26, sections 51-71 (Code 1957 Edition, 1966 Replacement Volume), applies to all counties except Montgomery County where the age limit for juveniles is already eighteen (18) years.

Article 26 would have applied to Baltimore City as of July 1, 1969, under the 1966 amendment to the Act, but the Legislature postponed the effective date of the amendment until July 1, 1970 (S.B. 27, signed by Governor Marvin Mandel on May 2, 1969).

The effective date of the amendment was further postponed until July 1, 1971 (H.B. 940).

The exception in Article 26 therefore exists only for Baltimore City, where the juvenile age limit remains sixteen (16), whereas it is eighteen (18) in all of the counties of the State of Maryland.

But for the exception contained in Article 26, section 70-1(c), the plaintiffs and the class they represent would be entitled to be treated as juveniles in the City of Baltimore for the alleged offense for which they have been and are presently facing prosecution in the City of Baltimore, as aforesaid. Conviction in Municipal Court could subject the plaintiffs and the class they represent to a criminal record and possible incarceration in an adult institution, whereas a finding of delinquency in Juvenile Court would not involve either of these possibilities.

The intervening plaintiff Neal alleges that on February 12, 1970 he was arrested and charged with receiving stolen goods. When his case came on for trial in the Municipal Court of Baltimore City on February 25, 1970, counsel moved to dismiss for lack of jurisdiction on the ground that the Juvenile Causes Act requiring that persons aged sixteen and seventeen committing criminal offenses in Baltimore City be tried as adults is unconstitutional. In the alternative, counsel for Neal argued that prosecution should be delayed until decision in this case. The Municipal Court denied the motion to dismiss, but has postponed trial until the disposition of this case. Neal's specific point is that he "became sixteen years only five weeks before his

arrest. Prior to that arrest, he had never been arrested or charged for any offense, nor had he ever been subject to the jurisdiction of the Juvenile Court * * *"

Just what the intervenor adds to the legal questions involved is not apparent. He testified that he found a transit card and "started filling the card out" when a teacher approached him; the card was turned in by him to a teacher, and two or three weeks later he was arrested on a warrant, and he was locked up in Central Police Station for two nights when he was released to the custody of his mother. His testimony was offered because plaintiff's counsel "did want the Court just to have the opportunity to observe a 16 year old." (Transcript of hearing April 24 and 27, 1970 — hereinafter Tr. — 131). Leave to intervene was granted in the absence of objection.

Plaintiffs requested the convening of a three-judge court, and this was done. A motion to dismiss was filed by defendants, which was elaborately briefed by both sides. In the course of preparation for the hearing, the undersigned became convinced that the case was not a proper one for a three-judge court. The attacked provision of the Code of Public Local Laws of Baltimore City is inevitably local. The only portion of the Maryland Code of Public General Laws, Article 26, section 70-1(c), attacked, reads as follows:

> " '*Child*' means a person who has not reached his 18th birthday, except in Baltimore City, where, until July 1, 1970, 'child' means a person who has not reached his 16th birthday."[1]

The exception in section 70-1(c) is purely local, and is not of state-wide application; and the prayers for relief seek injunctions against local officials only. The situation would seem clearly to fall within the reason and language of Moody v. Flowers, 1967, 387 U.S. 97, 101-103, 87 S. Ct. 1544, 18 L. Ed. 2d 643. The request by the undersigned for the convocation of a three-judge court was improvidently made. All parties to the case have agreed that it should

[1] Section 70-26, is the usual severability provision.

be heard by a single judge, and that they will not hereafter contend that the subject matter is one for a three-judge court.

Defendants' motion to dismiss was denied, and the case was heard on the merits, with two days of testimony; and further briefs were filed.

There thus have been, and until July 1, 1971 will be,[2] two classes of sixteen and seventeen year olds; those who reside outside of Baltimore City and/or who although residing in Baltimore City are not arrested within city limits; and those who whether or not residing within the limits of Baltimore City are arrested therein. It is thus the place of arrest, rather than place of residence, which is critical.

There can be no question but that distinctions based on county areas are not necessarily so unreasonable as to constitute a denial of equal protection; and that the Equal Protection Clause relates to equality between persons as such rather than between areas. Salsburg v. Maryland, 1954, 346 U.S. 544-545, 74 S. Ct. 280, 98 L. Ed. 281; and that "The presumption of reasonableness is with the State", ibid. 553, 74 S. Ct. 284, footnote 9 reading:

> "9. '* * * It is * * * a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power.' Atchison, T. & S.F. R. Co. v. Matthews, 174 U.S. 96, 104, 19 S. Ct. 609, 612, 43 L. Ed. 909. 'A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.' Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584, 55 S. Ct. 538, 540, 79

[2] Unless further extended by the Legislature, which seems to have formed a habit; or unless shortened by a declaration of invalidity.

L. Ed. 1070. See also, Middleton v. Texas Power & Light Co., 249 U.S. 152, 157-158, 39 S. Ct. 227, 228-229, 63 L. Ed. 527; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S. Ct. 337, 340-341, 55 L. Ed. 369." (McGowan v. Maryland, 1961, 366 U.S. 420, 425-426, 81 S. Ct. 1101, 6 L. Ed. 2d 393).

The presumption exists, however, only in the absence of evidence to the contrary; such evidence is clearly admissible. Salsburg, 346 U.S. at 553, 74 S. Ct. 280; McGowan, 366 U.S. at 426, 81 S. Ct. 1101.

Hence, while it must be assumed that there was reasonable ground for the Legislature in 1902 to fix the age of juveniles at under sixteen, and while there may be good grounds for fixing the juvenile age at sixteen state-wide,[3] the evidence, intrinsic and extrinsic, is that there is no justification for a differentiation in age between the City and the Counties.[4] Briefly, the proposed repeals of the exemption of Baltimore City from the otherwise Statewide provision are recognition that the original justification, if there were one, either no longer existed, or was ceasing, and that a phaseout was proposed. Further the testimony on behalf of plaintiffs and defendants clearly showed there was no real distinction between sixteen and seventeen year old residents of Baltimore City and the Counties. The place of arrest, rather than the inherent or acquired characteristics of the offenders, is purely fortuitous, but determinative.

If not the starting point, certainly the focal point for any consideration of the problems of the Juvenile Courts

---

[3] See state of flux on statewide ages in "Oyez, Oyez," Bulletin of the Section of Judicial Administration of the American Bar Association, Vol. 13, No. 1, p. 2; and the new District of Columbia Crime Bill.

[4] It thus becomes unnecessary to consider whether this case involves civil rights, as to which the Supreme Court has become "extremely sensitive", Levy v. Louisiana, 1968, 391 U.S. 68, 71, 88 S. Ct. 1509, 20 L. Ed. 2d 436, and as to which "strict scrutiny of the classification * * * is essential." Skinner v. Oklahoma, 1942, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655.

generally, and the lack of justification for any but a statewide uniform classification of juveniles, is the Report of the Legislative Council Special Committee on Juvenile Courts, January 1966 usually referred to as the Report of the Rasin Committee. (Joint Exhibit 1).[5]

The unanimous conclusion favored uniform age through seventeen throughout the State. The reasons are convincingly stated on pages 6-11, and are fully supported by the testimony in this case.

The Rasin Committee Report was unquestionably the foundation for the 1966 legislation, outlined above.

The Rasin Committee found (p. 7) that if there were disparity between city children and children in the counties in the past, "there is little evidence that those differences exist today. If differentiation of individuals is necessary, as it surely is, it should be made on the basis of facts about the individual, and not on the basis of an assumption about a huge and diverse group such as the youthful population of a city. Whatever differentiation is needed may be made by a court, either by the device of a waiver to the adult criminal court, or by the nature of the disposition following an adjudication of delinquency. The patent unfairness and unjustified inequality which results from the present disparity undermines a basic value of our legal system. * * *"

The testimony in this case fully supports the conclusion that there is no psychological or physical basis for distinguishing between sixteen and seventeen year olds residing in Baltimore City and in the Counties. Such is the testimony of Robert C. Hilson, Director of the State Department of Juvenile Services, after working with City and County children for a number of years (Tr. 10, 11); of Dr. John Hamilton, a licensed medical doctor, practicing psychiatrist, and Director of Clifton T. Perkins State Hospital

[5] The Committee contained one representative of the Baltimore City Juvenile system. Members of the Baltimore City Municipal Court and the Youth Court of the Criminal Court of Baltimore City were consulted.

(Tr. 45-59 — who also testified that City children on the whole were less mature than County children, and required more intensive services and attention); James V. Bennett, Director of the Federal Bureau of Prisons for twenty-seven years, and formerly in charge of the National Training School for Boys in Washington, D.C. (Tr. 142); and Judge Joseph Howard, a member of the Supreme Bench of Baltimore City, and a former probation officer and social caseworker (Tr. 206).[6]

Whatever may have been the original justification for the exclusion of sixteen and seventeen year olds arrested in Baltimore City from the scope of the Juvenile Court Act, the uncontroverted evidence is that such basis no longer exists, and the exception is arbitrary, unreasonably discriminatory, and not related to any legitimate State objective.

The effect, however, is not hypothetical or theoretical; it is starkly real.

The sixteen and seventeen year olds, regardless of residence, arrested for an offense in Baltimore City, will be tried as, and if convicted be subject to the penalties of, adults. They will be "booked", and if unable to obtain bail will be held in the Baltimore City Jail with adult offenders; if convicted, they will be incarcerated in adult institutions, and largely, if not completely, be deprived of the social, psychological and psychiatric services, and educational and vocational opportunities afforded juve-

[6] Whether the instant case was deliberately selected or purely fortuitous, it would be difficult to imagine one which more dramatically points out the fact that the purported differentiation is not based on any essential differences between the individuals involved. Long was a resident of Baltimore City, arrested in Baltimore City. Brooks was a resident of Howard County, arrested in Baltimore City and charged with an offense identical with that of Long. If the laws under attack are valid, both will be treated as adults. Had both committed the same offense in Howard County, both would be treated as juveniles. Had Long committed the same offense in Howard County, he, although a resident of Baltimore City, would have been treated as a juvenile. Reductio ad absurdum?

niles (Tr. 25, 55, 64-65, 69-70, 74-75, 76-83, 137-140). Further, if convicted as adults, these children may lose the right to vote; to serve in the Armed Forces; to secure many types of government and private employment (especially where bonds are required); and will carry forever the stigma of conviction.

While the discriminatory nature of the distinction herein involved would seem to be, and has been demonstrated to be, arbitrary and unreasonable only two cases seem directly to have considered the question.

One is Graves v. State, Court of Special Appeals of Maryland, Initial Term, 1967, No. 201, decided July 21, 1967 in a per curiam decision not for publication. Reliance was placed on Salsburg and McGowan, supra, and similar holdings by the Maryland Court of Appeals.

On the principal that, in the absence of evidence to the contrary (and there was none in Graves) it must be assumed that the Legislature had before it facts sufficient to justify its action, the opinion may be technically supportable, although the reference to phasing out would seem to speak of the past, rather than the present.[7] However, the opinion made no reference to the Rasin Report, or to State v. Gregori, 1924, 318 Mo. 998, 2 S.W.2d 747. That case held that a state law setting the age, for purposes of juvenile court jurisdiction, at seventeen in some counties and at eighteen in others was unconstitutional. The Court said (318 Mo. at 1002, 2 S.W.2d at 749):

> "We think it evident that different acts, both relating, however, to the treatment of delinquent children, one of which provides that a child in one part of the State shall be guilty of a crime and the other shall be subjected in another part of the State to the Juvenile Court Act, deny equal protection of the law to persons

[7] "* * * the postponement of the effective date of the repeal of the exemption of Baltimore City, to enable, in all probability, adequate facilities to be obtained to care for the increase in the number of persons to be treated as juveniles due to the raise in the age limit." (p. 4 of Opinion).

coming within their scope, and that the amendments to chapter 21, art. 6, Laws of 1923, page 153, are unconstitutional."

So far the consideration of the constitutionality of the laws in question has been restricted to their criminal aspects, as to which this court finds them to be unconstitutional. An additional ground for invalidation is also found in the discriminatory effect upon juveniles whose conduct, although not criminal, evidences a need for help and attention. Nowhere is this better or more succintly expressed than in the Rasin Report, pp. 10-11:

"One of the most compelling reasons for giving the Juvenile Court jurisdiction of children through age seventeen is the need to provide supervision for those children whose behavior is anti-social and deviant, although not criminal, and also for those children who may be neglected and dependent. The present statute defines a delinquent child as one (1) who violates any law or ordinance, or who commits any act which, if committed by an adult, would be a crime not punishable by death or life imprisonment; (2) who is incorrigible or ungovernable or habitually disobedient or who is beyond the control of his parents, guardian, or custodian, or other lawful authority; (3) who is habitually a truant; (4) who without just cause and without the consent of his parents, guardian, or other custodian, repeatedly deserts his home or place of abode; (5) who is engaged in any occupation which is in violation of law, or who associates with immoral or vicious persons; or (6) who so deports himself as to injure or endanger the morals of himself or others. In Baltimore City, a child of sixteen or seventeen who may come within one of the last five categories is immune from the power of any court, for the Juvenile Court has no jurisdiction over that age group and the criminal court has no jurisdiction over individuals who have not violated a criminal statute. If the State is wise in defining a delinquent as it does, then there is no reason for excepting from the Juvenile Court's

jurisdiction those sixteen and seventeen years olds in Baltimore City whose behavior causes them to fit the definition. It is clear that the thought which underlies the present definition of a delinquent is that children who engage in certain deviant behavior which is not in violation of a criminal statute are, nevertheless, in need of supervision, for such behavior may be and often is the precursor of more dangerous and costly criminal conduct."

That the effect of invalidation of the attacked legislation may require the additional expenditure of public funds, and may produce some administrative dislocation, may well be true. That truism was, however, clearly developed in the Rasin Report and the recognition of its impact resulted in its recommendation that the effective date of change be June 1, 1969.

That it may cost money and effort to correct an improper and unconstitutional condition is of course, no justification for the continuation of that condition. Moreover, the removal of Baltimore sixteen and seventeen year olds from the adult prison population (or their non addition to that population) would reduce, or at least not further increase, the present overcrowding of the adult penal systems (Tr. 74).

On the effect the removal of the exemption of Baltimore City would have on the juvenile system the testimony of the Director of the Maryland Department of Juvenile Services was clear and convincing. There "would be a chaotic situation until we were able to secure sufficient funding and everything that goes with providing these necessary services." (Tr. 32). "* * * [w]ithin a year of an undesirable management problem, we would again be able to survive and provide necessary services for all children up to the age of 18." (Tr. 34). "[W]ithout the necessary funding it would be longer than a year." (Tr. 37).

That July 1, 1971 is probably only another date to be in turn postponed appears from the following testimony of the Director (Tr. 41-42):

"Because of lack of resources, the Commissioner of Correction has told me that we are not able to program for the 16 or 17 year old child.

"Q. Now, I also understand that — whether or not the postponement is granted until 1971, that you do not have sufficient funding to build the necessary facilities for the additional case load of 16 and 17 year olds by 1971, is that correct? A. The additional facilities is only one part of our lack.

"The other part is the provision of services, provision of such services as well as community services. There would be no additional facilities, institutional facilities available by July 1, 1971.

"(Mr. Matera) I have no further questions, Your Honor.

"(The Court) Well, if the change in Baltimore City were delayed until 1971, would you be much better off on July 1, 1971 than you will be on July 1, 1970?

"(The Witness) To the extent that we would have more time to make additional requests for interim funding.

"(The Court) But if your requests were not granted?

"(The Witness) Well, if the requests are not granted — I told the Legislative Committee, the House Ways and Means Committee, as well as the House Judiciary Committee, unless funding is appropriated prior to the effective date of the change, I will be back next year saying we are still not prepared for the age change."

The court finds as a fact, and concludes as a matter of law, that the exemption of Baltimore City from the provision of Article 26, section 70-1(c) of the Maryland Code of Public General Laws defining a child as a person who has not reached his eighteenth birthday, and the provision of Article 4, section 240(b) of the Public Local Laws of

Baltimore City, setting a juvenile age of sixteen years, are and each of them is, in contravention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and are invalid.

RELIEF.

1. Plaintiffs have prayed that injunctions be issued against various individuals against enforcing, applying or implementing the provisions of the laws in question. The court is advised that these officials have so refrained, from the time of the institution of this suit, pending decision herein. It is assumed that the decision herein will be followed unless and until reversed on appeal, and that no injunction or restraining order need be issued.

2. Plaintiffs have also asked that all records with respect to the arrest and charging of the named plaintiffs and the class they represent with commission of offenses as adults in Baltimore City be expunged. The court believes that a satisfactory disposition of this matter can be effected by counsel for the parties.

The court will retain jurisdiction of this case with respect to the two immediately preceding paragraphs to take appropriate action if the court's expressed beliefs prove to be erroneous.

3. Retroactivity.

This decision shall apply to all cases not finally decided[8] on May 15, 1969, the date of the filing of this suit. While there would appear to have been little, if any, reliance on the decision in Graves v. State, supra, and while the Rasin Report cast at least grave doubts on the constitutionality of the Baltimore City exemption (as did the proposed

[8] A case is "finally decided" when the time for direct appeal expires without appeal having been taken, or if direct appeal has been taken and decision rendered, the date on which certiorari was denied or on which the time to apply for certiorari expired without such an application having been made. See Linkletter v. Walker, 1965, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601.

phase out by the Legislature), these indicia were equally apparent to counsel for juveniles. The disruption resulting from this decision will inevitably be severe, and the court accordingly declines to make the decision retroactive beyond May 15, 1969.

The foregoing constitutes the court's findings of fact and conclusions of law whether or not expressly so characterized. F.R. Civ. P. 52(a).

ORDER

This matter, having come on before this Court for a hearing, memoranda having been submitted and testimony having been taken, for the reasons set forth in the Court's opinion of this date, it is hereby order and adjudged that:

1. The Maryland Juvenile Causes Act, Md. Ann. Code, Art. 26, Secs. 51 et seq., be declared unconstitutional insofar as it exempts Baltimore City from the uniform juvenile age requirement of eighteen (18) years;

2. The provisions of Art. 4, S240 of the Public Local Laws of Baltimore City, as applied since 1945, be declared unconstitutional insofar as they define a child as a "person under the age of sixteen years" thereby excluding sixteen and seventeen year olds in Baltimore City from the scope of the Juvenile Causes Act;

3. All those between sixteen and eighteen years of age when arrested, except in the case of capital offenses, who are currently confined in City Jail and other sites of incarceration in Baltimore City awaiting trial be released to the juvenile authorities as expeditiously as possible.

4. There be entered an order for such other and further relief as the Court may find to be just and equitable.

APPENDIX I

UNITED STATES CODE

Title 28 — Judiciary and Judicial Procedure,
§ 2254 at 7645-46.

§ 2254. State custody; remedies in State courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court

POOR COPY

proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding. (June 25, 1948, ch. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105.)

APPENDIX J

ANNOTATED CODE OF MARYLAND

Vol. 3, Article 27, §§ 645 A-J at 490 *et seq.*

POST CONVICTION PROCEDURE

§ 645A. Right of appeal of convicted persons.

(a) *Right to institute proceeding to set aside or correct sentence.*—Any person convicted of a crime and either incarcerated under sentence of death or imprisonment or on parole or probation, including any person confined or on parole or probation as a result of a proceeding before a trial magistrate (including a judge of the Municipal Court of Baltimore City or of the people's court of any county) or a proceeding under Article 31B of the Code, title "Defective Delinquents," who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court or trial magistrate (including a judge of the Municipal Court of Baltimore City or of the people's court of any county) was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error which would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, may institute a proceeding under this subtitle to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction, or in any other proceeding that the petitioner has taken to secure relief from his conviction.

(b) *When allegation of error deemed to be finally litigated.*—For the purposes of this subtitle, an allegation of error shall be deemed to be finally litigated when the Court of Appeals or Court of Special Appeals has rendered a decision on the merits thereof, either upon direct appeal or upon any consideration of an application for leave to appeal filed pursuant to § 645-I of this subtitle; or when a court of original jurisdiction, after a full and fair hear-

BLEED THROUGH POOR COPY

ing, has rendered a decision on the merits thereof upon a petition for a writ of habeas corpus or a writ of error coram nobis, unless said decision upon the merits of such petition is clearly erroneous.

(c) *When allegation of error deemed to have been waived.*—For the purposes of this subtitle, an allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, unless the failure to make such allegation shall be excused because of special circumstances. The burden of proving the existence of such special circumstances shall be upon the petitioner.

When an allegation of error could have been made by a petitioner before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, but was not in fact so made, there shall be a rebuttable presumption that said petitioner intelligently and knowingly failed to make such allegation.

(d) *Decision that Constitution imposes standard not theretofore recognized.*—For the purposes of this subtitle and notwithstanding any other provision hereof, no allegation of error shall be deemed to have been finally litigated or waived where, subsequent to any decision upon the merits thereof or subsequent to any proceeding in which said allegation otherwise may have been waived, any court whose decisions are binding upon the lower courts of this State holds that the Constitution of the United States or of Maryland imposes upon State criminal proceedings a procedural or substantive standard not theretofore recognized, which such standard is intended to be applied retrospectively and would thereby affect the validity of the petitioner's conviction or sentence.

(e) *Not substitute for remedies incident to trial proceedings; time of filing petition for relief; other common-law and statutory remedies superseded.*—The remedy herein provided is not a substitute for, nor does it affect any remedies which are incident to the proceedings in the trial court or before the trial magistrate (including a judge of the Municipal Court of Baltimore City or of the people's court of any county) or any remedy of direct review of the sentence or conviction. A petition for relief under this subtitle may be filed at any time, except that where an appeal has been taken from the judgment of conviction to the Court of Appeals or Court of Special Appeals, it shall not be necessary to appoint counsel or conduct a hearing or take any action whatsoever on the petition, until the judgment of conviction becomes final in the court to which the appeal was taken. No appeals to the Court of Appeals of Maryland or the Court of Special Appeals in habeas corpus or coram nobis cases, or from other common-law or statutory remedies, which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment shall be permitted or entertained, except appeals in such cases pending in the Court of Appeals on June 1, 1958, shall be processed in due course. Provided, however, that nothing in this subtitle shall operate to bar an appeal to the Court of Special Appeals (1) in a habeas corpus proceeding instituted under § 25 of Article 41 of this Code or (2) in any other proceeding in which a writ of habeas corpus is sought for any purpose other than to challenge the legality of a conviction of a crime or sentence of death or imprisonment therefor, including confinement as a result of a proceeding under Article 31B of this Code. (1958, ch. 44; 1959, ch. 429; 1965, ch. 442, § 1; 1966, ch. 12, § 4; 1970, ch. 99, § 4; ch. 595.)

§ 645B. Writs of habeas corpus.

Repealed by Acts 1962, ch. 36, § 1.

Editor's note.—For provisions similar to those of the repealed section, see Maryland Rules, Rule Z55.

BLEED THROUGH POOR COPY

§ 645C. Petition—Filing; to be verified and sworn to; docketing.

Repealed by Acts 1962, ch. 36, § 1.

Editor's note.—For provisions similar to those of the repealed section, see Maryland Rules, Rules BK40 and BK41.

§ 645D. Same—Contents; attachments to an omissions from petition.

Repealed by Acts 1962, ch. 36, § 1.

Editor's note.—For provisions similar to those of the repealed section, see Maryland Rules, Rule BK41.

§ 645E. Same—Payment of costs by political subdivision.

If after judgment, a review is sought by the petitioner within thirty (30) days and the Court of Appeals or the Court of Special Appeals grants leave to appeal pursuant to § 645-I of this article and either of said courts finds that the petitioner is unable to pay the costs of the review, said courts shall order that all necessary costs and expenses incident thereto, including all court costs, stenographic services, and printing, be paid by the political subdivision in which the judgment is rendered. (1958, ch. 44; 1962, ch. 36, § 22; 1966, ch. 12, § 4.)

§ 645F. Same—Response by State; withdrawal; court order as to amendment, further pleadings, etc.

Repealed by Acts 1962, ch. 36, § 1.

Editor's note.—For provisions similar to those of the repealed section, see Maryland Rules, Rules BK44 and BK45.

§ 645G. Same—Hearing; proof; attendance of petitioner; order of final disposition.

Repealed by Acts 1962, ch. 36, § 1.

Editor's note.—For provisions similar to those of the repealed section, see Maryland Rules, Rules BK44 and BK45.

§ 645H. Same—Waiver of grounds not raised in original or amended petition; dismissal of petition.

Repealed by Acts 1965, ch. 442, § 2.

Former provisions incorporated in § 645A. — The former provisions of this section have been incorporated in subsec-

tion (c) of § 645A of this article. Faulkner v. Director of Patuxent Inst., 241 Md. 727, 217 A.2d 342 (1966).

§ 645I. Application for appeal of final order; appeal procedure; affirmation, reversal, etc., of order.

Any person, including the Attorney General of Maryland or the State's attorney for Baltimore City or any county, as the case may be, aggrieved by the order of the court or judge passed in accordance with this subtitle, may within thirty (30) days after the passage of said order apply to the Court of Appeals of Maryland for leave to prosecute an appeal therefrom in cases where the applicant is incarcerated under sentence of death, and may within thirty (30) days after the passage of said order apply to the Court of Special Appeals for leave to prosecute an appeal therefrom in all other cases. Said application for leave to prosecute an appeal shall be in such form as said appellate courts may, by their rules, prescribe, and in the event that the Attorney General or the State's attorney shall forthwith state his intention to file such application for an appeal, the order may be stayed, but the judge may, in his discretion, admit the petitioner to bail for his appearance when required. If the application to prosecute such appeal shall be granted, the procedure thereafter shall be in conformity with the rules of said appellate courts and the courts may affirm, reverse or modify the order appealed from, or they may remand the case for further proceedings, but if said application is denied, the order sought to be reviewed shall thereby become final. (1958, ch. 44; 1966, ch. 12, § 4.)

§ 645J. Short title.

This subtitle may be cited as the Uniform Post Conviction Procedure Act. (1958, ch. 44; 1959, ch. 429.)

FILE COPY

Supreme Court, U. S.
FILED
JAN 17 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-835

JOHN M. PETTIBONE, DIRECTOR, DIVISION OF PAROLE AND PROBATION, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,

Petitioner,

v.

KENNETH WOODALL, #B-1-103228,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

FRANCIS B. BURCH,
Attorney General of Maryland,

EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,

JOHN P. STAFFORD, JR.,
Assistant Attorney General
of Maryland,

DAVID H. FELDMAN,
Assistant Attorney General
of Maryland,
One South Calvert Street,
Baltimore, Maryland 21202,
(301) 383-3737,

Counsel for Petitioner.

The Daily Record Co., Baltimore, Md. 21203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-835

JOHN M. PETTIBONE, DIRECTOR, DIVISION OF PAROLE AND PROBATION, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,

Petitioner,

v.

KENNETH WOODALL, #B-1-103228,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I.

On page 1 of his Brief in opposition to certiorari Respondent, in commenting on Petitioner's statement of the case, alleges for the first time ever that, with respect to the exhaustion of state judicial remedies question, "the State fails to point out that respondent filed first in Federal court pursuant to oral agreement with the State of Maryland to follow that procedure." Counsel for Petitioner are informed by Respondent's counsel that this statement relates to an alleged agreement between Respondent's counsel and a former Assistant Attorney General of Maryland who previously represented Petitioner.

The statement quoted is clearly incorrect. Therefore, Petitioner calls the Court's attention to two affidavits executed

by that former Assistant Attorney General which demonstrate this fact and which are printed as appendices A and B hereto.[1]

II.

Petitioner also wishes to call the Court's attention to the fact that Respondent alleges at page 1 of his Brief in opposition to certiorari that the question presented is as follows: "Should a decision which, on constitutional grounds, deprives a court of subject matter jurisdiction over a certain class of cases and which, as to those same cases, impugns the integrity of the dispositional phase of the criminal process, be applied retroactively?"

Although Petitioner does not agree with Respondent's presentation of the question presented and believes that the questions presented as outlined in the Petition properly state the issues in this case, Petitioner notes that the question as phrased by Respondent is substantially identical to the question presented in two cases currently pending in this Court: namely, *Warner v. Flemings*, No. 71-1398, and *Gosa v. Mayden*, No. 71-6314, both argued December 4, 1972. These cases concern the retroactivity of *O'Callahan v. Parker*, 395 U.S. 258 (1969). Even though the United States Court of Appeals for the Fourth Circuit did not base its decision below on a resolution of the question now presented by Respondent, Respondent did argue this question in that court both in his principal brief[2] and in his reply brief.[3]

---

[1] Petitioner originally sought to bring this information to the Court's attention by letter to the Clerk dated January 10, 1973, but counsel for Petitioner were advised by the Clerk's office that such matters should properly be submitted in a petitioner's reply to respondent's brief in opposition.

[2] *See* Brief for Appellant at 53-56, a copy of which Brief has been lodged with the Clerk of this Court together with the certified record.

[3] *See* Reply Brief for Appellant at 24-34, a copy of which Reply Brief has also been lodged with the Clerk of this Court.

Your Petitioner does not believe that Respondent's case poses the question presented by Respondent[4] but suggests that if it does, the fact that two cases pending in this Court, *Warner* and *Gosa*, present substantially the identical question[5] is further demonstrative of the importance of the questions raised by the Petition and should compel the granting of certiorari in this case as well.

---

[4] *See* Brief of Appellee-Cross Appellant, in the Fourth Circuit, at 37-43, a copy of which Brief has also been lodged with the Clerk of this Court.

[5] As pointed out by Respondent in his opposition to Petitioner's motion for stay of mandate pending application for certiorari, filed in the United States Court of Appeals for the Fourth Circuit, a part of the certified record herein, at 10 n.10:

> "Moreover, it is likely that the Supreme Court, if it were inclined to grant certiorari, would hold the case in abeyance until it renders a decision in *Gosa v. Mayden*, which is now before it, following the granting of a Petition for Writ of Certiorari to the 5th Circuit. *See* 92 S.Ct. 2467 (1972). The *Gosa* case raises the issue of retroactivity in the context of absence of subject matter jurisdiction which was one of the two principal aspects of the retroactivity issue in the instant case. It would be unlikely that the Court would grant certiorari in other cases raising retroactivity issues until the relevance of its opinion in *Gosa* could be determined."

CONCLUSION

For the reasons stated above, as well as those stated in the Petition, Petitioner prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
JOHN P. STAFFORD, JR.,
Assistant Attorney General
of Maryland,
DAVID H. FELDMAN,
Assistant Attorney General
of Maryland,
Counsel for Petitioner.

POOR COPY

APPENDIX A

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-835

JOHN M. PETTIBONE, DIRECTOR, DIVISION OF PAROLE AND PROBATION, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,

PETITIONER,

v.

KENNETH WOODALL, #B-1-103228,

RESPONDENT.

AFFIDAVIT

STATE OF MARYLAND, CITY OF BALTIMORE, TO WIT:

I, ALFRED J. O'FERRALL, III, District Public Defender for Baltimore City, formerly an Assistant Attorney General of Maryland, at the request of the Office of the Attorney General of Maryland, do hereby make the following statements to supplement my affidavit executed May 11, 1972, which is attached hereto, with respect to my representation of Maryland's interests in *Woodall v. Pettibone*, 465 F.2d 49 (4th Cir. 1972), *rev'g*, 337 F. Supp. 595 (D. Md.), *petition for cert. filed*, 41 U.S.L.W. 3347 (U.S. Dec. 7, 1972) (No. 72-835):

I am informed that in Woodall's Brief in Opposition to Petition for a Writ of Certiorari filed herein, the new claim

is now made "that [Woodall] filed first in Federal court pursuant to oral agreement with the State of Maryland to follow that procedure"; and I am further informed that Woodall's counsel allege that I am the representative of the State of Maryland with whom the said oral agreement was made.

The claim that I agreed on behalf of the State of Maryland that Woodall should file his habeas corpus petition in federal court first is not true. I presently have no recollection of having spoken with Woodall's counsel about his case prior to the filing of his federal habeas corpus petition, but am certain that even if I did I made no agreement that Woodall should file his petition first in the federal court. If I had made such an agreement, I would affirmatively have waived exhaustion of state judicial remedies in the State's initial answer to the petition, in accordance with my uniform practice as set forth in my May 11, 1972, affidavit.

I hereby affirm, attest, and confirm that the foregoing statements are made by me on personal knowledge, and are true and correct to the best of my knowledge, information, and belief.

/s/ ALFRED J. O'FERRALL, III,
District Public Defender
for Baltimore City.

Subscribed and sworn to before me, a Notary Public of the State of Maryland, this 10th day of January, 1973.

/s/ JOAN F. WEBSTER,
Notary Public.

(Seal)

My Commission expires: July 1, 1974.

POOR COPY

APPENDIX B

STATE OF MARYLAND, CITY OF BALTIMORE, TO WIT:

I, ALFRED J. O'FERRALL, III, District Public Defender for Baltimore City, and formerly an Assistant Attorney General of Maryland, do hereby, at the request of the Office of the Attorney General of Maryland, make the following statements with respect to my representation of Maryland's interests in *Woodall v. Keller*, 337 F. Supp. 595 (D. Md. 1972), *appeals pending sub nom. Woodall v. Pettibone*, Nos. 72-1242 & 72-1264 (4th Cir.):

When I filed the Respondent's Answer on September 24, 1971, it was not my intention to then or later specifically raise the issue of whether Woodall had exhausted his effective state judicial remedies. My view of the case was that a true retroactivity question was not presented, but rather that the question raised was purely factual: namely, whether the allegedly unequally protective statutory scheme had a rational basis in fact at the time Woodall's offenses were committed. However, although it was not my intention to raise the exhaustion issue, it was definitely not my intention to waive on behalf of the State of Maryland its right to assert that defense. In the few cases where it had been my intention to specifically waive the exhaustion question, it was uniformly my practice to affirmatively do so in writing or otherwise of record. Therefore, although I did not plan to raise the exhaustion issue myself, as I did not specifically and affirmatively waive that question of record, I informed my successor Assistant Attorney General assigned to the case, and have subsequently informed Woodall's counsel, that my view was that the State of Maryland was free to raise the exhaustion issue in Woodall's case as it deemed appropriate.

I hereby affirm, attest, and confirm that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

/s/ ALFRED J. O'FERRALL, III,
District Public Defender
for Baltimore City.

Subscribed and sworn to before me this 11th day of May, 1972.

/s/ LOUISE P. HENNEBERGER,
Notary Public.

(Seal)

My commission expires: July 1, 1974.